

# CLERK'S COPY.

## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 660

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WILLIAM McCRONE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA  
\_\_\_\_\_

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR CERTIORARI FILED FEBRUARY 9, 1939.

CERTIORARI GRANTED MARCH 13, 1939.

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**ATTORNEYS' NAMES AND ADDRESSES**

Mr. H. L. MAURY,  
of Butte, Montana, and  
Mr. A. G. SHONE,  
of Butte, Montana,  
Attorneys for Appellant.

Mr. JOHN B. TANSIL,  
United States District Attorney,  
of Butte, Montana, and  
Mr. R. LEWIS BROWN,  
Assistant United States District Attorney,  
of Butte, Montana,  
Attorneys for Appellee. [1\*]

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In the District Court of the United States  
in and for the District of Montana

No. 979

In the Matter of  
the Application for an Attachment  
against WILLIAM McCRONE.

Be it remembered, that on May 2, 1938, Notice of  
Appeal was duly filed herein, in the words and fig-  
ures following, to wit: [2]

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\*Page numbering appearing at the foot of page of original certified  
Transcript of Record.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States of America, and to John B. Tansil, United States District Attorney for the District of Montana, and to R. Lewis Brown, Deputy United States District Attorney for the District of Montana:

Name and address of appellant:

William McCrone, 21 West Pacific Street, Butte, Silver Bow County, Montana.

Name and address of appellant's attorneys:

H. Lowndes Maury, 33 Hirbour Building, Butte, Silver Bow County, Montana.

A. G. Shone, 33 Hirbour Building, Butte, Silver Bow County, Montana.

Offense:

On April 22, 1938, appellant was cited into court to show cause why he should not be required to obey the command of a subpoena and to submit himself to interrogation by Paul W. DeFoe, an agent of the Internal Revenue Bureau, and to give such information concerning the subject of official inquiry as may be within the knowledge of appellant. Appellant claimed and asserted his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States in refusing to answer the questions put to him by Paul W. DeFoe; nevertheless, the court on April 23, 1938, ordered appellant to again appear before Paul W. DeFoe, as such agent, and make a full, true, complete, accurate and

truthful disclosure of all matters and facts within appellant's knowledge material and pertinent and concerning the subject [3] matter of the investigation carried on by said Internal Revenue officer. At the second hearing before Paul W. DeFoe appellant still refused to answer certain questions propounded to him and again claimed and asserted in refusing to answer his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States. Appellant was then cited into court on April 27, 1938, at two o'clock, P. M., then and there to show cause, if any he had, why he should not be punished for his disobedience of the order of the court of date April 23, 1938, and for his acts and conduct in holding the said court, its authority and its said order in disregard and contempt.

Date of Judgment:

April 28, 1938.

Brief description of judgment or sentence:

Appellant was committed to the custody of the United States Marshal for the District of Montana to be by said marshal confined in the County Jail of Silver Bow County, Montana, and held in confinement in such jail until appellant purges himself of his said contempt by obeying the order of the court given and made April 23, 1938, by giving his testimony before Paul W. DeFoe, an agent and officer of the Internal Revenue Bureau, of all matters and facts within appellant's knowledge concern-

ing the subject matter of the inquiry and investigation then being carried on by the said Paul W. DeFoe, as such officer and agent, and by making a full, true, complete, accurate and truthful disclosure of all matters and facts within appellant's knowledge, material and pertinent and concerning the subject matter of the investigation then being carried on by such officer, Paul W. DeFoe.

Name of prison where now confined, if not on bail: [4]

Appellant is now confined in the County Jail of Silver Bow County at Butte, Montana. The District Court denied appellant's application for bail and refused appellant bail.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

WM. McCRONE

Appellant

Dated May 2, 1938.

Grounds of appeal:

1. The United States of America must be a party to the proceedings; this being a proceeding for criminal contempt.

2. There are no proper parties plaintiff nor defendant herein.

3. On the trial of the contempt proceedings no evidence of any kind or character was offered or introduced against appellant. No witnesses were

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nor took the stand against appellant; no documentary evidence was offered or received in evidence against appellant.

At the commencement of the hearing, the burden of proof was shifted upon appellant to prove he was not guilty of the contempt charged against him.

No contempt of court was committed for the reason that appellant did nothing else than assert his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States and his right and privilege to counsel under the Sixth Amendment to the Constitution of the United States.

H. LOWNDES MAURY

A. G. SHONE

Of Butte, Montana,

Attorneys for Appellant. [5]

Service of the foregoing notice of appeal acknowledged and copy received this 2 day of May, 1938.

JOHN B. TANSIL

United States District Attorney  
for the District of Montana

By R. LEWIS BROWN

Assistant United States District  
Attorney for the District of  
Montana

[Endorsed]: Filed May 2, 1938. [6]



That on April 27, 1938, the following proceedings were had as appears from the journal of the court, to wit:

[Title of District Court and Cause.]

This matter came on regularly this day for hearing on the Rule and Order of this Court issued on April 26, 1938, requiring William McCrone to appear before this Court at 2 o'clock P. M. this day to show cause why he should not be punished for his disobedience of the order of this Court of date April 23, 1938, and for his contempt.

Mr. R. Lewis Brown appeared on behalf of the United States and Messrs. H. L. Maury and A. G. Shone appeared for William McCrone. William McCrone was present in person.

Mr. H. L. Maury filed the Motion of William McCrone to Quash the Rule and Order of this Court issued herein on April 26, 1938, and also filed the Affidavit of H. L. Maury. Mr. Maury then read and presented to the Court the said Motion to Quash and Affidavit. After due consideration of said Motion to Quash and Mr. Maury's argument thereon, Court ordered that the Motion of William McCrone to Quash the Rule and Order of this Court issued herein on April 26, 1938, be and the same is denied. Mr. Maury excepted to the ruling of the Court and the Court ordered that the exception be noted.

Mr. Maury then informed the Court that William McCrone wishes to enter a plea of not guilty to contempt, whereupon Mr. Brown objected to the entry



of a plea of not guilty herein on the ground that counsel for William McCrone is mistaken in assuming that this is a criminal proceeding. Court ordered that the plea of not guilty be entered.

Mr. A. G. Shone asked leave of Court to argue the point that there is no contempt herein, whereupon Mr. Shone was fully heard by the Court.

Mr. William McCrone was sworn and examined by Mr. Maury, and thereafter the matter was submitted.

Court ordered that this proceeding be taken under advisement until 10 o'clock tomorrow morning and that William McCrone will return here and be present in this Court at that time.

Entered in open Court at Butte, Montana, April 27, 1938.

C. R. GARLOW

Clerk

By HAROLD L. ALLEN

Deputy Clerk [7]

That on April 28th, 1938, the following proceedings were had as appears from the journal of the court, to wit:

In the District Court of the United States  
in and for the District of Montana

No. 979

In the Matter of the Application for an Attachment  
Against WILLIAM McCRONE.

Court ordered that this matter is continued until 3 o'clock this afternoon, and that Mr. William McCrone be in Court at that time.

(3:00 P. M.)

No. 979

In the Matter of the Application for an Attachment  
Against WILLIAM McCRONE.

At 3 o'clock P. M. this day, Mr. William McCrone being present in Court in person, and also represented by his counsel Messrs. H. L. Maury and A. G. Shone, and Mr. R. Lewis Brown appearing for the United States, this proceeding came regularly on for further proceedings.

After due consideration of all proceedings had and done herein; the Court signed and ordered filed and entered, the following written order:

No. 979

In the Matter of the Application for an Attachment  
Against WILLIAM McCRONE.

**ORDER**

This matter coming on regularly to be heard before the Honorable James H. Baldwin, Judge, on this the 27th day of April, 1938, the applicant being represented by R. Lewis Brown, Assistant Attorney of the United States, in and for the District of Montana, and William McCrone being personally present in court and represented by his counsel, H. L. Maury and A. G. Shone, thereupon, and upon the opening of court, counsel for the said William McCrone filed herein a motion to quash and affidavit of H. L. Maury. The motion to quash was argued to the Court by counsel and was by the Court over-

ruled and denied; thereupon and at the request of counsel for William McCrone, made in open court, and over the objection of the District Attorney the said William McCrone was permitted to and did enter a plea of not guilty; and thereupon the said William McCrone was by his counsel called as a witness and sworn and testified in his own behalf, and thereupon no further testimony being offered or received, the matter was by the Court taken under advisement until 10:00 o'clock A. M. of April 28, 1938, and at that hour until 3:00 o'clock P. M. on that day.

The Court having considered all of the matters and proceedings had and done in the above entitled matter, and all of the evidence, including the affidavit of Paul W. DeFoe, filed, and being fully advised in the premises, finds that all of the matters, facts and statements set out and contained in the affidavit of Paul W. DeFoe, filed herein on April 26, 1938, are true and so finds that William McCrone presented himself at the office of the said Paul W. DeFoe, Special Agent of the Bureau of Internal Revenue of the United States at 4:00 o'clock P. M. on the 23rd day of April, 1938, as he had been directed and ordered to do by this court, and further finds that at said time and place the said Special Agent of the Bureau of Internal Revenue of the United States, Paul W. DeFoe, commenced to [8] interrogate the said William McCrone and attempt to take the testimony of the said William McCrone about matters and facts within his own personal knowledge that were pertinent and material to the sub-

ject of the inquiry then being carried on and conducted by the said Paul W. DeFoe, and the Court further finds that the said William McCrone, at said time and place and before the said officer, did not give his testimony to said officer of the matters and facts within his knowledge concerning the subject matter of the inquiry and investigation then being carried on by the said agent and officer, Paul W. DeFoe, or any of them, and did not, at said time and place, make a full, true, complete, accurate and truthful disclosure of all matters and facts within his knowledge, material and pertinent and concerning the subject matter of the investigation being carried on by such officer, or did not make any disclosure whatsoever, or at all, of said matters and facts, or any of them, or any disclosure either in whole or in part and wilfully and deliberately and wrongfully disobeyed the order and command of this Court entered herein on the 23rd day of April, 1938, and did wilfully and deliberately and wrongfully disobey said order of said Court and failed, refused and neglected to give his said testimony as required by said order to said officer, or at all, and wilfully and deliberately and wrongfully failed and refused to make a full, true, complete, accurate and truthful disclosure of the matters and facts within his knowledge, material and pertinent and concerning the subject matter of the investigation then being carried on by such officer, or to make any disclosure whatsoever, or at all; and the Court further finds that the said William McCrone, when he

appeared before the said officer as commanded by this Court, informed the said officer that he did not intend to and would not give his testimony or answer his questions, or give him any information of any material facts that he had within his knowledge concerning the subject matter of the investigation being carried on by the said Paul W. DeFoe, as such officer and agent; and the Court further finds that the said William McCrone, by his acts and conduct and refusal to obey the said order of this court, was in defiance and contempt of this court and of its said order and of its authority, and that the said William McCrone is now in contempt of this said court and its said order and its authority and has and continues to disobey its said order.

The Court further finds that the said William McCrone did not on the 27th day of April, 1938, or at all, and upon his appearance before the above entitled Court, in obedience to the rule and order to show cause issued by this Court, show any cause whatsoever, or was any cause shown whatsoever by him or on his behalf, why he should not be held in contempt of the above entitled court, or why he should not obey the order of this Court, dated April 23, 1938; the Court further finds that the prayer of the affidavit filed herein should be granted.

Wherefore, by reason of the law and the premises, it is ordered, and this does order, that the said William McCrone be and he is hereby committed to the custody of the United States Marshal for the District of Montana to be by said United States Mar-



shal confined in the county jail of Silver Bow County, Montana, and to be held in such confinement in such county jail by said United States Marshal until the said William McCrone purges himself of his said contempt by obeying the order of this Court, duly given and made on the 23rd day of April, 1938, by giving his testimony before Paul W. DeFoe, an agent and officer of the Internal Revenue Bureau, of all matters [9] and facts within his personal knowledge concerning the subject matter of the inquiry and investigation now being carried on by the said Paul W. DeFoe, as such officer and agent, and by making a full, true, complete, accurate and truthful disclosure of all matters and facts within his knowledge, material and pertinent and concerning the subject matter of the investigation now being carried on by such officer.

It is further ordered that a copy of this order, duly attested by the Clerk of this Court under the seal of the Court, shall serve as a sufficient warrant for the Marshal to carry this order into execution.

---

William McCrone by and through his counsel H. L. Maury excepted to the order just made.

Mr. Maury: The defendant further excepts that the Court in its opinion, findings, sentence and decision has not taken into consideration the state of the record that McCrone pleaded not guilty.



Court thereupon stated that this is a matter of a civil nature and not a criminal proceeding; that counsel and the Court were in error in permitting the entry of a plea of not guilty.

Mr. Maury: Exception.

The Court: The Court now holds that the Court erred in permitting the entry of the plea of not guilty.

Mr. Maury: William McCrone in addition to ex-

Mr. Maury: William McCrone in addition to accepting generally to all of the order, points out and suggests to the Court that some certain time limit should be put in the order of confinement (on the ground that) the order as it stands might be an imprisonment for life.

The Court: The order will be filed.

Mr. Maury: Exception.

Further McCrone suggests and objects that the order is too general requiring him to answer all of the matters and facts within his personal knowledge concerning the subject of the inquiry and investigation; McCrone says that that should be limited.

McCrone also assigns that any question of purgation should not be confined to the judgment of Paul W. DeFoe, since Paul W. DeFoe may die or be otherwise unable to conduct the investigation. Some other agent might take it over. The order should be amended accordingly.

Mr. Maury asked the Court at this time for time, 15 days, in which to prepare, serve and file a bill of exceptions. Mr. Brown stated that there was no objection to this request.

The Court: Let the record show upon the request of the attorney for Mr. McCrone he is granted 15 days from this date within which to prepare, serve and lodge with the Clerk his proposed bill of exceptions on the rulings of the Court made here in this hearing. [10]

Mr. Maury asked the Court that bail be fixed herein.

The Court: No bail will be fixed; this is a civil proceeding and has none of the elements of a criminal proceeding; the prayer of the affidavit was in part that the said McCrone should be imprisoned in some proper jail until such time as he should obey the order of this Court heretofore entered on April 23, 1938, and thus purge himself of that contempt; the order is in accordance with that prayer and law.

Mr. Maury: William McCrone excepts to the Court's refusal to allow bail.

The Court: Exception will be noted; Marshal will take Mr. McCrone into custody.

Entered in open Court at Butte, Montana, April 28, 1938.

C. R. GARLOW

Clerk

By HAROLD L. ALLEN

Deputy Clerk [11]

That on May 3, 1938, the following proceedings were had, as appears from the journal of the court, to wit:

[Title of District Court and Cause.]

It is ordered by the court that the matter of the settlement of the bill of exceptions herein and proposed amendments and the objections to the praecipe for transcript of record on appeal herein, be set for hearing by the court at Butte, Montana, on May 5th, 1938, at 10 A. M.

Entered in open court at Butte, Montana, May 3rd, 1938.

C. R. GARLOW,

Clerk [12]

That on May 5, 1938, the following proceedings were had and order made, as appears from the journal of the court, to wit:

[Title of District Court and Cause.]

This matter came on regularly for hearing at 10 A. M. this day for settlement of the proposed bill of exceptions of William McCrone, proposed amendments thereto, and the objections of the petitioner to portions of the respondent's praecipe for transcript on appeal herein, Mr. R. Lewis Brown, Assistant District Attorney, appearing for the petitioner, and Mr. H. L. Maury appearing for the respondent.

Thereupon the matter was duly heard, argued and submitted and by the court taken under advisement.

Thereupon counsel for respondent William McCrone filed and presented to the court a Petition for an order of Admission to bail on behalf of said respondent, which was submitted to the court, taken under advisement, and further hearing continued until 2 p. m. this day.

Thereafter, at 2 P. M., counsel for the respective parties were present as before; whereupon the court filed and ordered entered the following written order on settlement of the bill of exceptions:

[Title of District Court and Cause.]

ORDER ON SETTLEMENT OF PROPOSED  
BILL OF EXCEPTIONS LODGED WITH  
THE CLERK HEREIN ON MAY 2, 1938.

The proposed Bill of Exceptions of William McCrone to the orders during the hearing had herein on April 27 and 28, 1938, was lodged with the Clerk of the Court on May 2, 1938, after service upon the Attorney of the United States for the District of Montana. On May 3, 1938, the Attorney of the United States for the District of [13] Montana served upon counsel for William McCrone and lodged with the Clerk of this Court his objections to the Bill of Exceptions as proposed by William McCrone and proposed amendments thereto,—thirteen (13) in number.

The proposed Bill of Exceptions and the objections on proposed amendments thereto were delivered by the Clerk of the Court to me at Butte, Montana at 11:45 in the morning on May 3, 1938, and at that time I designated the hour of ten

o'clock in the morning on May 5, 1938, at the courtroom of the above-entitled court in the Federal Building at Butte, Montana, as the time and place when and at which I would settle the Bill of Exceptions.

At the hour of ten o'clock in the morning on May 5, 1938, the settlement of the proposed Bill of Exceptions and the consideration of the objections thereto and of the proposed amendments hereinbefore referred to was taken up at the courtroom of the above-entitled court in the Federal Building at Butte, Montana in the presence of Mr. H. L. Maury, one of the attorneys for William McCrone, and Mr. R. Lewis Brown, Assistant Attorney of the United States for the District of Montana; thereupon the court asked what if any agreement had been entered into by and between counsel with reference to the settlement of said proposed Bill of Exceptions and the allowance of the said proposed amendments thereto. Thereupon Mr. Maury stated in the presence and with the concurrence of Mr. Brown that it had been agreed between them that the court should allow each and all of said proposed amendments excepting only proposed amendment No. 12 and proposed amendment No. 13; and thereupon the matter was by the court continued for further hearing until the hour of two o'clock in the afternoon on May 5, 1938, at the same place, and now at the hour of two o'clock in the afternoon on May 5, 1938, it is ordered, and this does order, that said proposed Bill of Exceptions lodged with the Clerk on

7



May 2, 1938, as aforesaid, be and the same is hereby ordered amended as follows:

(Clerk's Note: In the original typewritten transcript there were here inserted four and one-half pages of corrections to the proposed bill. On oral stipulation of counsel that all of these corrections have been made in the bill of exceptions as settled and as printed herein, these corrections are not printed here.) [14]

When so amended the proposed Bill of Exceptions will be signed, settled and allowed and ordered filed.

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And thereupon, after due consideration, court ordered that the application for admission to bail of the said William McCrone be and is denied, to which ruling of the court counsel for said William McCrone then and there excepted and said exception was ordered noted.

Entered in open court May 5th, 1938.

C. R. GARLOW,

Clerk. [19]

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Thereafter, on May 5th, 1938, an Amended Praecipe for transcript of record on appeal was filed herein, in the words and figures following, to wit:

[20]



[Title of District Court and Cause.]

**AMENDED PRAECIPE**

To the Clerk of the above entitled Court:

The praecipe heretofore given you for forwarding of the *the* record is now withdrawn. Please forward to the Clerk of the Appellate Court the bill of exceptions, notice of appeal, assignment of errors, all minute entries relating to the case, and copy of this praecipe.

Yours very truly,

H. L. MAURY

A. G. SHONE

Attorneys for William McCrone

Service of the foregoing praecipe acknowledged and copy received this 5th day of May, A. D., 1938.

JOHN B. TANSIL

United States District Attorney  
for Montana

R. LEWIS BROWN

Assistant United States District  
Attorney for Montana

C. R. GARLOW

Clerk of the United States District Court

[Endorsed]: Filed May 5th, 1938. [21]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America;  
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 21 pages, numbered consecutively from 1 to 21, inclusive, is a full, true and correct transcript of all portions of the record and proceedings in the above entitled matter mentioned in the appellant's praecipe therefor, save and except the bill of exceptions and assignment of errors, the originals of which are transmitted herewith, and save and except certain minute entries which were by the court ordered stricken from the Bill of Exceptions upon the hearing and settlement thereof, as appears from the original files and records of said court in my custody as such clerk.

I further certify that the costs of said record on appeal amount to the sum of \$13.60, and have been paid by the appellant.

Witness my hand and the seal of said court at Butte, Montana, this May 6th, A. D. 1938.

[Seal]

C. R. GARLOW

Clerk U. S. District Court,  
District of Montana [22]

[Title of District Court and Cause.]

**BILL OF EXCEPTIONS**

Be it remembered that in the above entitled cause the following proceedings were filed, had, orders made, objections interposed, rulings made by the court and exceptions taken, minute entries made and the proceedings, orders and exceptions hereinafter appearing had and taken thereon, and upon the trial before the Honorable James H. Baldwin, Judge, sitting without a jury, on the dates and at the times herein stated, at Butte, Montana; R. Lewis Brown appearing as attorney for the Government and H. L. Maury and A. G. Shone appearing as attorneys for the defendant.

The following proceedings were had, orders made, objections interposed, rulings made by the court and exceptions taken, and the proceedings, orders and exceptions hereinafter appearing had and taken thereon and the evidence and testimony hereinafter set out being all of the evidence and testimony offered and introduced and offered and rejected. The testimony and evidence hereinafter set out is and was all of the testimony and evidence offered by the parties hereto and heard by the court in this cause and received by the court and offered by the parties to this cause and rejected by the court, to-wit:

[After Title of District Court and Cause.]

PAUL W. DeFOE, being first duly sworn on his oath, deposes and says:

That he is a Special Agent of the Bureau of Internal Revenue of [23] the United States and as such a duly accredited officer of said Bureau designated to make investigations arising under the Internal Revenue Law, with reference to the correctness of any return filed and required thereunder, and to require and receive from all persons having knowledge as to the correctness of such returns any information that they may have, and that he was duly and regularly appointed and commissioned as such officer on the 22nd day of August, 1934, by the Honorable Guy T. Helvering, the Commissioner of Internal Revenue of the United States, and that his said commission is in full force and effect and has never been revoked.

That acting under and by virtue of the authority contained in his said commission, and at the direction of the said Commissioner of Internal Revenue, and as a part of his official duties, he has been engaged in making an investigation of the correctness of a return made and filed under the Internal Revenue Law of the United States by one, a citizen and resident of Montana and of the Internal Revenue District of Montana. That in the course of such investigation your affiant obtained the information that one William McCrone, residing at Butte, Silver Bow County, Montana, possessed information concerning the subject of his inquiry and

concerning the correctness of the said income tax return so being investigated by your affiant. That thereupon, and in order to carry on his said investigation, it was and is necessary that the said William McCrone submit himself to be interrogated by your affiant, as such officer, concerning any knowledge or information that he might have about the matter under investigation by your affiant, and to that end your affiant did on the 21st day of April, 1938, issue a subpoena to the said William McCrone requiring the said William McCrone to appear before him and give testimony concerning the subject under investigation by your affiant, and served the said subpoena personally upon said William McCrone at Butte, Silver Bow County, Montana, on said [24] day and date. That a full, true and correct copy of the said subpoena, with the exception of the name of the individual whose tax return is being investigated, is attached hereto and hereof made a part. That the said William McCrone appeared before your affiant at room 306 of the Post Office building, Butte, Montana, and was thereupon duly sworn as a witness by your affiant, and your affiant commenced to interrogate the said William McCrone. That thereupon the said William McCrone requested that the interrogation be continued until 1:30 o'clock in the afternoon of April 21, 1938, and that your affiant consented to such continuance. That at 1:35 P. M., on April 21, 1938, the said William McCrone came to room 306 of the Post Office building in Butte, Montana, and there informed

your affiant that he did not propose to voluntarily answer any questions which might be proposed to him by your affiant concerning the subject matter of his inquiry and did not intend to voluntarily make any statement, or give any information whatsoever to your affiant concerning the subject of the inquiry, and failed and refused to make any statement or to answer any questions or to give any information concerning the subject of the inquiry. That in this connection your affiant says that he was not making any investigation concerning William McCrone, or of which William McCrone was the subject, or was not making any investigation concerning the correctness or accuracy of any return filed by the said William McCrone under the Internal Revenue Act, and that William McCrone was not the subject of the investigation being carried forward by your affiant, and that the said William McCrone was so notified by your affiant of all such facts.

That from the investigation made by him, your affiant believes that the said William McCrone has personal knowledge of facts pertinent and material to the subject matter of his investigation and that by his refusal to answer the questions propounded by your affiant [25] and that by his refusal to make any statement whatsoever, the said William McCrone is wrongfully withholding from your affiant, as an officer of the United States, matters and facts and information within his personal knowledge, material and pertinent to the subject



of the inquiry and is thus preventing your affiant from proceeding further with his investigation of the matter under inquiry, and preventing him from performing the duties imposed upon him as an officer of the United States.

Wherefore, your affiant prays that an attachment issue for the person of said William McCrone, returnable forthwith before this Court, and that upon the bringing into court of the said William McCrone, the said Court direct the said William McCrone to submit himself to examination by your affiant at room 306 of the Post Office building in Butte, Silver Bow County, Montana, between the hours of 9:00 o'clock in the morning and 5:00 o'clock in the afternoon and to then and there answer truthfully such questions as may be propounded to him by your affiant that are material and pertinent to the subject matter of his investigation in accord with the terms of the subpoena heretofore issued and served upon the said William McCrone, and for such other order as the Court may deem necessary to permit the affiant to further continue his investigation.

PAUL W. DeFOE

Subscribed and sworn to before me this 22 day of April, 1938.

[Seal]

R. LEWIS BROWN

Notary Public

[Endorsed]: Filed April 22, 1938.

**SUMMONS TO APPEAR, TO TESTIFY, AND  
TO PRODUCE BOOKS, ETC.**

In the matter of the tax liability of [26]

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District of Montana for the year 1932 to 1937  
inclusive.

The Commissioner of Internal Revenue  
To William McCrone

Residing at Butte, Montana

Greeting:

You are hereby summoned and required to appear before the undersigned Special Agent of the Bureau of Internal Revenue, at Room 306, Post Office Bldg., Butte, Montana on the 21st day of April, 1938, at 1:30 o'clock in the afternoon, to give testimony in the matter of the tax liability of the above-named person for the years designated, and directed to bring with you the following books and papers:

---

Failure to comply with this summons will render you liable to proceedings in the District Court of the United States for the district in which you reside, to compel your attendance, testimony, and production of books, etc.

Issued under authority of Section 618 of the Revenue Act of 1928, this 21 day of April, 1938.

PAUL W. DeFOE

Special Agent

[After Title of District Court and Cause.]

**MOTION**

Comes now the Attorney of the United States, in and for the District of Montana, and respectfully moves the Court that an order of attachment be issued herein under the hand and seal of the Court to William McCrone, requiring him to appear before the said Court at a time certain, to show cause, if any he has, why he should not be compelled to obey the subpoena heretofore served upon him on the 21st day of April, 1938, by Paul W. DeFoe, Special Agent of the [27] Bureau of Internal Revenue, and submit himself to examination as required by said subpoena and the laws of the United States.

This motion is based upon the affidavit of the said Paul W. DeFoe filed herein.

Dated April 22, 1938.

**R. LEWIS BROWN**

Assistant Attorney of the United  
States, in and for the District of  
Montana

[Endorsed]: Filed April 22, 1938. [28]

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[After Title of District Court and Cause.]

**ANSWER**

Now comes William McCrone and respectfully shows to the court in answer to the matter of the application for an attachment against William McCrone:

1.

That he has appeared before the Hon. Paul DeFoe, Special Agent of the Bureau of Internal Revenue of the United States. That he has been, and expressed a willingness to testify as to any matter, the answer to which would not incriminate him or have a tendency to incriminate him, the said William McCrone.

2.

That the said Paul DeFoe announced that if the said William McCrone did not answer questions and all questions put to him by the said Paul DeFoe that it would be a confession of guilt on McCrone's part and the said Paul DeFoe announced to the said William McCrone that if he stated that his refusal to answer certain questions was because the answer would tend to incriminate William McCrone himself, that that would be a confession of William McCrone that he was an accessory to crime or a particeps criminis.

3.

That William McCrone is willing to appear again before such Paul DeFoe provided a competent stenographer of William McCrone's own choosing, be allowed to appear with William McCrone and take down what is said by Paul DeFoe or any other examiner and by William McCrone.

H. LOWNDES MAURY

Attorney for William McCrone

A. G. SHONE

Of Counsel for William McCrone

[Endorsed]: Filed April 23, 1938. [31]

[After Title of District Court and Cause.]

ORDER

This matter coming on regularly to be heard on this the 23rd day of April, 1938, before the Honorable James H. Baldwin, Judge, the United States being represented by R. Lewis Brown, Assistant Attorney of the United States, in and for the District of Montana, and William McCrone being personally present in court and represented by his counsel, H. L. Maury, the matter having been fully presented, and submitted to the Court for consideration and decision:

And it appearing to the Court that all the matters, facts and statements set out and contained in the affidavit upon which this proceeding was based are true and that Paul W. DeFoe is and at the [32] times mentioned in the said affidavit was an agent and officer of the Bureau of Internal Revenue and acting under the directions and instructions of the Commissioner of the Bureau of Internal Revenue of the United States, and that on the 21st day of April, 1938, the said Paul W. DeFoe, as such officer and agent of the Bureau of Internal Revenue and of the United States, was lawfully acting within his authority and in the performance of his official duties, and that the subpoena issued to the said William McCrone by the said Paul W. DeFoe on the 21st day of April, 1938, was in all respects duly and regularly and lawfully issued and served by said officer and agent upon the said William Mc-



Crone, and that the said William McCrone was lawfully required thereby to appear before the said Paul W. DeFoe, as such officer and agent of the Internal Revenue Bureau of the United States and to submit himself in attendance before such officer at the time and place mentioned in said subpoena, and to give his testimony of matters and facts within his knowledge about the subject matter of the investigation being carried on by such officer and agent; and the Court further finds that the said William McCrone wrongfully failed and refused to give any testimony or to make any statement whatsoever to the said officer and agent of matters and facts within his personal knowledge concerning the subject matter of the inquiry being carried on by the said agent, and which were material and pertinent to the subject matter of the said inquiry, and that the subject matter of the said inquiry and investigation was not of or concerning the said William McCrone, or of any income tax return of the said William McCrone that he did or did not make; the Court further finds that the motion of the government herein should be and is hereby granted.

Wherefore, it is ordered, and this does order, that you, William McCrone, be and appear at room 306 of the Post Office building, in the City of Butte, County of Silver Bow, State and District of Montana, at the hour of 4 o'clock in the afternoon on the 23rd day of [33] April, 1938, and give your testimony before Paul W. DeFoe, an agent and officer of the Internal Revenue Bureau, of all mat-

ters and facts within your knowledge and concerning the subject matter of the inquiry and investigation, now being carried on by the said Paul W. DeFoe, as such officer and agent, and if during the giving of your said testimony, it becomes necessary that an adjournment or continuance be had before you have completed giving your said testimony, that you again appear before the said Paul W. DeFoe, as such officer and agent, at the same place in the Post Office building at such time as may be fixed by him, which shall be between the hours of 9:00 o'clock A. M. and 12:00 o'clock noon, and 1:00 o'clock and 5:00 o'clock in the afternoon, and continue such attendance until you have given all of your testimony and made a full, true, complete, accurate and truthful disclosure of all matters and facts within your knowledge, material and pertinent and concerning the subject matter of the investigation now being carried on by such officer.

Done and dated April 23, 1938.

JAMES H. BALDWIN

Judge of the above entitled Court

[Endorsed]: Filed and entered April 23, 1938.

[34]

[After Title of District Court and Cause.]

AFFIDAVIT

United States of America  
District of Montana—ss.

Paul W. DeFoe, being first duly sworn on his oath deposes and says:

That he is a Special Agent of the Bureau of Internal Revenue of the United States and as such duly accredited officer of said Bureau designated by the Commissioner of Internal Revenue of the United States to make investigations arising under the Internal Revenue law, with reference to the correctness of any return filed as required thereunder and to require and receive from all persons having knowledge as to the correctness of such returns any information that they may have, and to that end is authorized and empowered to issue subpoenas requiring the attendance of any person having knowledge in the premises in order that he may take his testimony [35] with reference to the matter required by law to be included in such return and has the power to administer oaths to such persons so subpoenaed.

That acting under and by virtue of his authority as a Special Agent of the Bureau of Internal Revenue and at the direction of the Commissioner of Internal Revenue and as a part of his official duties, he has been engaged in making an investigation as to the correctness of a return made and filed under the Internal Revenue law of the United States by one, a citizen and resident of Montana and of the

Internal Revenue District of Montana; and that in the course of such investigation he learned and obtained the information that one William McCrone at Butte, Silver Bow County, State and District of Montana, possessed information concerning the subject of his inquiry and the correctness of the said income tax return so being investigated by the affiant.

That thereupon and in order to carry on his said investigation, it was and is necessary that the said William McCrone submit himself to be interrogated by your affiant, as such officer, concerning any knowledge or information that he might have about the matter under investigation by your affiant and to give his testimony concerning the same, and in order to procure the attendance of the said William McCrone before him for the purpose of taking his said testimony, your affiant did, on the 21st day of April, 1938, issue a subpoena to the said William McCrone and served the same upon the said William McCrone personally in Butte, Silver Bow County, Montana, commanding and requiring the said William McCrone to appear before him at room 306 of the Post Office building at Butte, Silver Bow County, Montana, on April 21, 1938, and to give testimony concerning the subject under investigation by your affiant and as to the correctness of the said return.

That thereupon and on the said 21st day of April, 1938, the said [36] William McCrone appeared before your affiant at the time and place mentioned in

the said subpoena and thereupon your affiant administered the oath to the said William McCrone as a witness usually and customarily administered to witnesses, and commenced to attempt to take the testimony of the said William McCrone as to the matters and facts personally known to him concerning the correctness of the said return. That thereupon the said William McCrone refused to answer any question put to him by your affiant, except some preliminary questions as to his name, residence and occupation, and informed your affiant that he did not intend to voluntarily answer any questions that your affiant might put to him concerning the subject matter of his inquiry and as to matters and facts within his own knowledge, and did not intend to voluntarily make any statement or give any information whatsoever to your affiant concerning the subject of the inquiry, and failed and refused to make any statement, or to answer any questions, or give any information concerning the subject of the said inquiry.

That thereupon your affiant, in order that he might perform his official duties and obey the direction of the Commissioner of the Bureau of Internal Revenue of the United States and proceed with his said investigation and so that the said investigation might not be prevented by the failure of the said William McCrone to give his testimony of matters and facts within his own knowledge, material and pertinent to the subject of your affiant's investigation, and to the correctness of the income



tax return then being investigated by him, did file his affidavit in the above entitled court and cause, setting forth the necessary facts, and at his instance the Attorney of the United States, in and for the District of Montana, filed a motion in the above entitled court and cause, wherein and whereby the above entitled court was requested to exercise the jurisdiction granted to it by Section 1523A of Title 26, U. S. C. to issue its process [37] to compel the attendance of the said William McCrone before your affiant and compel him to give his testimony as to the matters and facts within his own personal knowledge as to the subject of the investigation being carried on by your affiant; which matters and facts were and are material and pertinent to such investigation.

That thereupon and upon the filing of such affidavit and motion in this court on the 22nd day of April, 1938, this court made and entered its order on said 22nd day of April, 1938, requiring and commanding the said William McCrone to appear before the court in its court room on April 23, 1938, at the hour of 10:00 o'clock A. M., and then and there show cause, why he should not be required to obey the command of the said subpoena to submit himself to interrogation by your affiant and to give such information and testimony concerning the subject of his official inquiry as was within his personal knowledge.

That thereupon the said William McCrone, with his counsel, appeared in open court before the Court

on the 23rd day of April, 1938, at the hour of 10:00 o'clock A. M., and thereupon, and at the request of counsel for the said William McCrone, further hearing was continued by the Court until the hour of 2:00 o'clock P. M. of April 23, 1938.

That at the said hour of 2:00 o'clock P. M. on the 23rd day of April, 1938, the said William McCrone appeared personally in open court before the Court and was represented by counsel. That thereupon the motion then pending before the Court and heretofore referred to was submitted to the Court, and the Court being duly advised in the premises, duly and regularly gave and made its order and judgment, wherein and whereby the prayer of the motion was granted and the said William McCrone was ordered, directed and commanded by the Honorable, the above entitled Court to be and appear at room 306 of the Post Office building, in the city of Butte, County of Silver Bow, State [38] and District of Montana, at the hour of 4:00 o'clock P. M. on the 23rd day of April, 1938, before the said Paul W. DeFoe, and then and there to give his testimony and to make a full, true, complete, accurate and truthful disclosure of all matters and facts within his knowledge, material and pertinent and concerning the subject matter of the investigation then being carried on by such officer and agent. That a full, true and correct copy of the said order of the Court is hereto attached, marked "Exhibit A", and hereof made a part as fully and completely as though set out herein in haec verba.

That thereafter and at the hour of 4:00 o'clock P. M. on the said 23rd day of April, 1938, the said William McCrone appeared before your affiant at the time and place so directed by the order of this Court and thereupon your affiant administered the oath customarily and usually administered to witnesses and proceeded to interrogate the said William McCrone in an attempt to obtain his testimony and in an attempt to obtain from the said William McCrone a disclosure of matters and facts within his own knowledge concerning the subject of the inquiry being carried on by your affiant, material and pertinent thereto. That thereupon the said William McCrone refused to answer any question put to him by your affiant, material and pertinent to the subject of the inquiry, and refused to make any statement whatsoever and refused to give your affiant any information whatsoever or disclosure as to the matters and facts within his knowledge, material and pertinent to the subject of the inquiry then being carried on by your affiant.

That a full, true, accurate and correct transcript of the matters and proceedings had and done before your affiant, the questions asked by your affiant and the answers and statements made by William McCrone to your affiant at said time and place is hereto attached, marked "Exhibit B", and hereof made a part as fully and completely as though the same were set out herein in haec verba. [39]

That the acts and conduct of the said William McCrone and his refusal to testify to matters within

his own knowledge, material and pertinent to the subject of the investigation being carried on by your affiant, and his refusal to divulge any such personal knowledge, or to give your affiant any information whatsoever, was deliberate on the part of the said William McCrone and was on his part in direct disobedience, defiance and contempt of this said Court and of its order hereto attached as "Exhibit A" and of the authority of the Court, and the said William McCrone, by his said acts and conduct, has held and does hold this Court and its authority and its order in contempt, and has and does deny the authority of this Court and has and does disobey its said order.

That the investigation now being carried on by your affiant is not of and does not concern the said William McCrone, or of any income tax return made by him under the provisions of the Internal Revenue laws of the United States, or of any other act done by him, or that he was required to do, if any, under and by virtue of the provisions of the Internal Revenue Act of the United States, or any other law of the United States of America. That the said William McCrone is not by your affiant, as such officer, suspected of violating any of the laws of the United States and the said investigation carried on by him concerns entirely another and is not being carried on by him with the end in view, or for the purpose, or in the belief that any knowledge or information that the said William McCrone may have would in any manner subject him to any

prosecution or punishment under any law of the United States, or particularly under any provision of the Internal Revenue laws of the United States. That all of such facts hereinabove set out were fully made known to the said William McCrone before he was asked any questions by your affiant. [40]

Your affiant further says that the continued refusal of the said William McCrone to give his testimony herein and to disclose to your affiant, as such officer, the matters and facts within his personal knowledge, which are material and pertinent to the subject of the inquiry being carried on by him, will hinder, delay and impede the successful carrying on of the said investigation and the performance by your affiant of his official duties, and that it may possibly impede and obstruct the investigation to such an extent that it cannot be further carried on by your affiant, and that the information possessed by the said William McCrone is material, necessary and indispensable to the further carrying on of the said investigation and the performance by your affiant of his official duties.

Wherefore, your affiant prays that a rule and order to show cause be issued out of this Court by this Court and that the said William McCrone be ordered and directed to be and appear before the Court at a time certain, then and there to show cause why he should not be imprisoned in some proper jail until such time as he shall obey the order of this Court, heretofore entered and attached hereto as "Exhibit A" and thus purge himself of his said contempt and



affiant further prays that after the issuance of such rule and order, and upon the hearing thereof, that the said William McCrone be, by the Court, ordered confined and imprisoned in a proper jail until such time as he obeys the said order of the Court herein, duly given and made and referred to, and purge himself of his said contempt; and for such other and further order or relief as to the Court may seem meet, just and necessary in the premises.

PAUL W. DeFOE

Subscribed and sworn to before me this 26th day of April, 1938.

[Seal]

R. LEWIS BROWN

Notary Public, in and for the State of Montana,  
residing at Butte, Montana.

My commission expires January 27, 1939. [41]

[Endorsed]: Filed Apr. 26, 1938.

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EXHIBIT "A"

[After Title of District Court and Cause.]

ORDER

This matter coming on regularly to be heard on this the 23rd day of April, 1938, before the Honorable James H. Baldwin, Judge, the United States being represented by R. Lewis Brown, Assistant Attorney of the United States, in and for the District of Montana, and William McCrone being personally present in Court and represented by his

counsel, H. L. Maury, the matter having been fully presented and submitted to the Court for consideration and decision;

And it appearing to the Court that all the matters, facts and statements set out and contained in the affidavit upon which this proceeding was based, are true and that Paul W. DeFoe is and at the times mentioned in the said affidavit was an agent and officer of the Bureau of Internal Revenue and acting under the directions and instructions of the Commissioner of the Bureau of Internal Revenue of the United States, and that on the 21st day of April, 1938, the said Paul W. DeFoe, as such officer and agent of the Bureau of Internal Revenue and of the United States, was lawfully acting within his authority and in the performance of his official duties, and that the subpoena issued to the said William McCrone by the said Paul W. DeFoe on the 21st day of April, 1938, was in all respects duly and regularly and lawfully issued and served by said officer and agent upon the said William McCrone, and that the said William McCrone was lawfully required thereby to appear before the said Paul W. DeFoe, as such officer and agent of the Internal Revenue Bureau of the United States, and to submit himself in attendance before such officer at the time [42] and place mentioned in said subpoena, and to give his testimony of matters and facts within his knowledge about the subject matter of the investigation being carried on by such officer and agent; and the Court further finds that the

said William McCrone wrongfully failed and refused to give any testimony or to make any statement whatsoever to the said officer and agent of matters and facts within his personal knowledge concerning the subject matter of the inquiry being carried on by the said agent, and which were material and pertinent to the subject matter of the said inquiry, and that the subject matter of the said inquiry and investigation was not of or concerning the said William McCrone, or of any income tax return of the said William McCrone that he did or did not make; the Court further finds that the motion of the government herein should be and is hereby granted.

Wherefore, it is ordered, and this does order, that you, William McCrone, be and appear at room 306 of the Post Office building, in the city of Butte, County of Silver Bow, State and District of Montana, at the hour of 4:00 o'clock in the afternoon, on the 23rd day of April, 1938, and give your testimony before Paul W. DeFoe, an agent and officer of the Internal Revenue Bureau, of all matters and facts within your knowledge concerning the subject matter of the inquiry and investigation, now being carried on by the said Paul W. DeFoe, as such officer and agent, and if during the giving of your said testimony, it becomes necessary that an adjournment or continuance be had before you have completed giving your said testimony, that you again appear before the said Paul W. DeFoe, as such officer and agent, at the same place in the Post

Office building at such time as may be fixed by him, which shall be between the hours of 9:00 o'clock A. M. and 12:00 o'clock noon, and 1:00 o'clock and 5:00 o'clock in the afternoon, and continue such attendance until you have given all of your testimony and made a full, true, complete, accurate and truthful disclosure of all matters [43] and facts within your knowledge, material and pertinent and concerning the subject matter of the investigation now being carried on by such officer.

Done and dated April 23, 1938.

JAMES H. BALDWIN

Judge of the above entitled court

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EXHIBIT "B"

Mr. McCrone was duly sworn by Special Agent DeFoe.

Q. Mr. McCrone, you are here pursuant to order No. 979 issued this date by the Honorable James H. Baldwin, Judge of the District Court of the United States, District of Montana, Butte. Is that correct?

A. Yes, sir.

Q. Do you fully understand that the purposes of this inquiry in no way relate to any liability which you may be under with respect to Federal laws?

A. I refuse to answer that question. The answer to it would tend to criminate myself. I will not be a witness against myself.

Q. I now inform you, Mr. McCrone, that this investigation in connection with which you are now

being examined relates to the Federal income tax liability of a person other than yourself. I also inform you that this examination has nothing to do in any way with your own Federal income tax liability. Do you now understand?

A. I refuse to answer that question. The answer to it would tend to criminate myself. I will not be a witness against myself.

Q. Do you know Mr. Ron Pepple?

A. I refuse to answer that question. The answer to which would tend to criminate myself. I will not be a witness against myself.

Q. Did you sometime between February 1 and 10, 1937, accompany Mr. Ron Pepple from Butte to Helena, Montana?

A. I refuse to answer that question. The answer to it would tend [44] to criminate myself. I will not be a witness against myself.

Q. Did you, between February 1 and 10, 1937, receive from Mr. Ron Pepple a sum of money which was to be given by you to another person?

A. I refuse to answer that question. The answer to it would tend to criminate me. I will not be a witness against myself.

Q. Did you, between February 1 and 10, 1937, receive from a person other than Ron Pepple, a sum of money which you paid subsequently to another person?

A. I refuse to answer that question. The answer to it would tend to criminate me. I will not be a witness against myself.



Q. Let me again remind you, Mr. McCrone, that you have appeared here for examination as a witness at the direction of the United States District Court; and further, that your personal Federal income tax liability is not under investigation. Do you still decline to answer the questions already propounded?

A. I refuse to answer that question. The answer to it would tend to criminate me. I will not be a witness against myself.

Q. Are we to understand that you will continue to refuse to answer for the reasons given with respect to any similar questions which may be propounded to you?

A. I refuse to answer that question. The answer to it would tend to criminate me. I will not be a witness against myself.

Q. Have you anything to add to this statement, Mr. McCrone?

A. I refuse to answer that question. The answer to it would tend to criminate me. I will not be a witness against myself.

Q. I now ask you if you will examine this transcript of the questions and answers here given, and if you find the transcript correct whether you will sign the statement?

A. I refuse to answer that question. The answer to it would tend to criminate me. I will not be a witness against myself. I will not, [45] examine the manuscript and will not sign it.

[After Title of District Court and Cause.]

### **RULE AND ORDER**

It appearing to the Court from the affidavit of Paul W. DeFoe, a Special Agent and officer of the Bureau of Internal Revenue of the United States, that William McCrone has disobeyed the order and judgment of this Court of date the 23rd day of April, 1938, and has and does hold the Court, its authority and its said order and judgment in disregard and contempt, and it appearing to the Court that it is proper that a rule and order to show cause be issued as prayed for in said affidavit;

Now, Therefore, It Is Ordered, and this does order, and command, you the said William McCrone to be and appear before the above entitled court at its court room in the Post Office building in the city of Butte, County of Silver Bow, State and District of Montana, on April 27, 1938, at the hour of 2 o'clock P. M., then and there to show cause, if any you have, why you should not be punished for your disobedience of the said order of this court of date April 23, 1938, and for your acts and conduct in holding this said Court, its authority and its said order in disregard and contempt.

Dated April 26, 1938.

**JAMES H. BALDWIN**

Judge of the above entitled court.

Issued Apr. 26, 1938.

**C. R. GARLOW**

Clerk

By **HAROLD L. ALLEN**

Deputy: [46]

(Wednesday, April 27, 1938, 2:00 P. M.)

The Court: No. 779. In the matter of the Attachment against William McCrone.

Mr. Maury: If the court please, there has been served and filed an instrument of which the following is a copy, and also on affidavit.

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[Title of District Court and Cause.]

**MOTION TO QUASH.**

Comes now William McCrone and appearing specially for the purpose of this motion only, moves the above entitled Court to quash and set aside the rule and order issued herein upon the affidavit of Paul W. DeFoe on the ground and for the reason:

1.

That the affidavit upon which the rule and order of Court was made and issued is insufficient in fact and in law for the issuance of process against William McCrone by the above entitled Court.

2.

That the said affidavit does not state facts sufficient to invoke the jurisdiction of the above entitled Court, in that, there are no allegations of fact stated therein showing or tending to show that this Court has jurisdiction over the person of William McCrone.

3.

That the rule and order herein, and the application therefore, are improperly entitled, for that no

civil action is pending connected in any way with this proceeding, and, it does not appear from any instrument in this proceeding that the United States of America is a party thereto, and, no process has been issued herein in the name of the United States of America, or [47] in the name of the President of the United States of America, or in the name of the Chief Justice of the Supreme Court of the United States. Further, that there are no parties plaintiff nor defendant herein.

## 4.

That it appears from the affidavit of H. L. Maury, on file herein, that at and during the entire proceeding before the Hon. Paul W. DeFoe against the expressed will, request and demand of William McCrone to said DeFoe, William McCrone's chosen counsel, H. L. Maury, an attorney of this court, he being present and willing to serve McCrone, was excluded and denied permission to be present or represent the said McCrone at the said hearing, and McCrone was thereby denied the privilege of having counsel to represent him at and in said proceedings.

Dated at Butte, Montana, this 27th day of April, A. D. 1938.

H. L. MAURY

A. G. SHONE

Attorneys for William McCrone.

Signed by McCrone's counsel and served.

The affidavit after title of this proceeding is as follows:

"H. Lowndes Maury, being duly sworn upon his oath, does say: I am an attorney-at-law duly licensed and admitted of this court. On April 23, 1938, at 3:50 o'clock P. M. I appeared with William McCrone at Room 306 of the Post Office Building, Butte, Montana, in the presence of Paul W. DeFoe and William McCrone, and I then and there demanded of said DeFoe that I be present during the hearing ordered by the court and represent or advise William McCrone as to his rights under the laws of the United States. That said DeFoe denied me permission to [48] remain during the hearing. That I insisted on remaining for the purpose of representing my client, William McCrone, and advising him as to his legal rights and also for the purpose of being a witness as to what might take place. That all presence on my part was denied by the said Paul W. DeFoe. He refused me permission and demanded that I leave the room where the examination of McCrone was to take place, and on my leaving closed the door behind me. That I stated to the said DeFoe that I was an attorney of the Bar of this court and an attorney of long standing of the Bar of United States Supreme Court and of the Circuit Court of Appeals for the Ninth Circuit, and such were the facts at the time that McCrone desired me to represent him before the said Paul W. DeFoe."

Mr. Maury: I do not believe that the matter set forth in the affidavit will be controverted. I believe at this time its uncontroverted.



The questions presented by the motion, or the Motion to Quash, are of grave historical significance to the American people.

The Court: I realize that probably as fully as counsel. My ancestors fought just as yours did during the Revolutionary period, if yours fought. They fought for liberty during the revolution, but we will get at this proceeding by examining the facts involved and applying the law thereto. Have you any cases supporting your theory in this matter. I don't care for a historical review of the government's history.

Mr. Maury: I have only the Constitution of the United States that a man is entitled to be represented by counsel. If counsel appears and demanding, and the client or person also demanding, the right of representation, insisting that that [49] right would be carried up to the point but not over the line of the breach of the peace, not over the line, but up to the point. That right was refused to McCrone.

The Court: Just what specific right was refused to McCrone. What specific right was denied to McCrone which is guaranteed by the Bill of Rights?

Mr. Maury: The right to be represented by counsel.

The Court: There is no question about that under certain circumstances.

Mr. Maury: I say under all circumstances a man has a right in any proceeding of a judicial nature, or of a criminal nature, or of an inquisitorial nature to be represented by counsel.

The Court: Upon what particular section of the Constitution do you base your contention?

Mr. Maury: It provides that he need not be a witness against himself.

The Court: That's the 5th Amendment I think.

Mr. Maury: It's the 5th Amendment of the Constitution.

The Court: I wish to know exactly what basis you are laying your argument on. You suggested now the 5th Amendment which provides that no man in a criminal proceeding may be compelled to be a witness against himself.

Mr. Maury: And also that he may be represented by counsel. Whenever courts seek to read exceptions into these broad constitutional provisions it is somewhat of a burden on courts to show where the exception comes in rather than on the citizen assaulted of his rights guaranteed by the Constitution to show that there are decisions in his favor. At one time there were no decisions about the Constitution of the United States, none existing. No provisions of the Constitution had come to the [50] courts and yet the Constitution stood just as it is supposed to stand today without judicial interpretation of any kind and in all of its majesty for the protection of the citizen.

I must admit that in reviewing this matter just at this moment I have no decision that I can call to Your Honor's attention on this particular thing in point, except the general historic opinions of the Supreme Court of the United States soon after the

Constitution and its Amendments were ratified, and that is this: That the star chamber proceedings which had existed during the time of Charles the Second and James, and which had resulted in driving James the Second from England, that was the result, had become no longer a part——

The Court: Just a moment. This is not a review of the historical events of the past. This is not the point at the moment. We are not reviewing that. I am perfectly familiar with the rule that where the words of the Constitution are plain, simple and unambiguous they construe themselves, and I am also aware of the fact that the power of the court in matters of contempt is great.

Mr. Maury: Is what?

The Court: Is large, and I am also of the opinion because of the very power that the court has, a Judge must act with caution in these matters. However, Mr. Maury, I have neither the time nor the inclination to listen to a discussion of historical events. I want a legal argument based upon the facts in this case or at least upon legal principles, so we will confine the argument to that point; and I wish to call your attention to the fact that the sections of the Constitution that you refer to appear as Amendments Five and Six and these Amendments deal only with criminal cases. [51]

Amendment five provides that no person shall be held to answer for what,—a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in

actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Your contention here as I understand it, is that the proceeding is one involving the compelling of Mr. McCrone to testify as a witness against himself in a criminal case. The Sixth Amendment relates to the right of counsel; that amendment provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have what,—“the assistance of counsel for his defense”.

That applies as you know only to criminal prosecutions. Now, if there is any provision of the Constitution or any Amendments to it——

Mr. Maury: That's where I differ from the court. I say that in this very proceeding he has the privilege of counsel in anything preliminary to a criminal prosecution. [52]

The Court: Very well, Mr. Maury, that's just a difference of legal opinion. I am asking now for au-

thorities to support your view. The Constitution says that in all criminal prosecutions he shall have this right. I am asking you now to give to the court or cite to the court any other provisions of the Constitution of the United States, or any Amendment thereto, or any decision of any Federal Court, which will bear out your theory that a person at all times and in all places within the territorial limits of the United States has the right to the assistance of counsel. I am merely asking for information, Mr. Maury, and assistance here, for legal authorities of some kind supporting your view.

Mr. Maury: I shall attempt to get for Your Honor such authorities.

The Court: You should have had it here now. Courts cannot wait while counsel searches.

Mr. Maury: Well on a hurried notice of an application or citation for contempt served one afternoon and to be heard the next, I combed all of the authorities of the United States, of course, for a particular decision. Especially when there are other important points in the case for the defense. It is not provided in all or in any of our provisions to carry all of the law in one's head. It is impossible.

The Court: As I understand your position on that point, the right to assistance of counsel, you have not now any authority to present which will support your view.

Mr. Maury: Here was virtually pending a quasi-criminal matter against William McCrone.

The Court: He has counsel here now.



Mr. Maury: He has counsel here now. He had counsel. He had [53] the right to have counsel throughout.

The Court: Lets deal with realities. I have asked you pointedly a question. Your position now is that you have no authority available at the moment sustaining your views that a person is at all times and in all places within the territorial limits of the United States entitled to the assistance of counsel.

Mr. Maury: No.

The Court: We will pass that point. I will give you an opportunity to present the law. This is not going to be snap judgment but I am not going to waste time listening to personal opinions.

Mr. Maury: Now as to the other features of this motion. We have no civil suit of any kind pending. I agree that it is perfectly competent for this court. It has jurisdiction. If there is a cause of action pending where one citizen is seeking a remedy against another citizen this court can in such a case exercise its process to see that all parties and officers, including, of course, attorneys of the court, be not guilty of contempt. In fact show all respect to the orders of the court where such a civil case is pending. None is here pending that has any relevancy to this.

The Court: Oh yes. Lets deal fairly with the law. There was a proceeding pending of which this court was given jurisdiction. You don't contest that point. Do you contend that under the provisions of section 1523-A, Title 26, United States Codes, I think it is, this court did not have authority to proceed

as it did in ordering that Mr. McCrone appear before an administrative officer to give testimony in a matter which did not involve him but did involve someone else. That is the proceeding pending. There was an order made. Now, are you contesting the power or [54] jurisdiction of the court to make that order?

Mr. Maury: I am talking about a subsequent order to show cause.

The Court: I am talking about the foundation of the entire proceedings.

Mr. Maury: That should have been in the nature of some process of the United States; some title to apprise the defendant of the nature of the charge against him and who is charging him.

The Court: There is no charge made. The record doesn't show—doesn't indicate any charge made against Mr. McCrone. It shows clearly and definitely that no charge of any kind has been made against Mr. McCrone. It shows further in the same matter by specific statement that the investigation now under way does not and cannot in any way involve him, either in a civil or criminal way. It relates entirely to the investigation made by the Treasury Department under specific act of Congress directing it to proceed and ferret out and determine whether citizens of the country falling within the limits of the revenue law paying income tax have fairly made a return on taxable income.

Mr. Maury: As to this motion.

The Court: You suggested one other thing, that he is being required, that the defendant, or rather

McCrone, is being required or is being asked to become a witness against himself in a criminal case. Upon what do you base that theory?

Mr. Maury: In a criminal proceeding, a quasi-criminal proceeding. Contempt is a quasi-criminal proceeding and has always been held to be a quasi-criminal proceeding.

The Court: We will agree it has many of the elements of the criminal prosecution. We will also agree when a man or woman [55] is cited into court to show cause why he or she shouldn't be punished for contempt of its authority that that person is entitled to counsel, entitled to their day in court and entitled to protect his rights by proof, if needed, showing there was no contempt, or by law which will support the position he takes; but the point about which I am inquiring is what theory and what authority do you base your contention.

Mr. Maury: That this is a criminal proceeding.

The Court: That the proceeding in which the witness apparently refused to testify is of a criminal nature and that it is necessary for him to claim his right or that he has a right under the Constitution.

Mr. Maury: We haven't come to any plea of not guilty.

The Court: We come to this point: Your motion is overruled.

Mr. Maury: Note our exception.

The Court: Exception may be noted.

Mr. Maury: McCrone is here to plead.

Mr. Shone: Has the court ruled on the motion?

The Court: Yes.

Mr. Maury: Exception.

The Court: Exception will be noted.

Mr. Maury: McCrone is here to plead.

Mr. Brown: I see no occasion for any plea here, and I object to the entry of a plea. He is required to show some kind of cause and some kind of return. This is no criminal proceeding.

The Court: We are not calling him into court on a criminal proceeding. He is merely ordered to appear here to show cause why he should not be punished for contempt for having refused to do what the court ordered him to do. As I view it there should be some pleading putting in issue the statements or [56] affidavit upon which the power of the court was set in motion.

Mr. Maury: The defendant wishes to enter a plea to the court of Not Guilty.

The Court: Very well. He may enter a plea of Not Guilty. What proof have you to support that. For the present we will simply take it the affidavit which is made direct, and which if true, is sufficient on its face to show a contempt of the authority of this court is true until its controverted by some proof known to the law.

Mr. Maury: We are going to have McCrone sworn.

The Court: For the purpose of the record I might suggest in reply to counsel's contention that counsel should be allowed to sit in the room where the investigation is made by Administrative officers. It occurs to me there are other constitutional rights guaranteed to each of us, and one of those consti-



tutional rights is the right to life, liberty and pursuit of happiness. Now, someone, who I don't know and am not interested, is under investigation by an administrative branch of the government for the purpose of determining whether he has fairly reported his income for income tax purposes. Now, I don't know on what theory it can be reasonably held that that hearing should be public. It may or may not lead to a criminal prosecution, but it appears to me from the humanitarian standpoint, as well as the legal one, the one who is under investigation would probably prefer to have his right to a good reputation protected rather than McCrone should have counsel in the room present where the investigation is being made, which is merely an investigation with reference to a specific thing for the purpose of enabling the government, as I understand it, to determine whether it will accept the return on income tax of the individual as properly made, or [57] add penalties and increase the tax to be assessed in the event that it be ascertained he has not properly reported his income. In other words, the proceeding is one of a civil nature and McCrone is merely a witness called to testify what he knows personally of the facts surrounding the income or which may be considered in determining what the taxable income of the person whose income report is being investigated. So we will just set aside the criminal features of the case. You say you want McCrone sworn?

Mr. Shone: Can I say a few words.

The Court: Well, on what point Mr. Shone?



Mr. Shone: On the proposition that no contempt has been perpetrated by William McCrone.

The Court: He deliberately refused to answer any questions.

Mr. Shone: That's the point I want to argue.

The Court: That argument should have been made on a Motion to Quash, but, however, I am willing to listen.

Mr. Shone: Your Honor has I presume the original order and affidavit with the questions attached.

Now in looking over these questions, may it please the court, McCrone answered the first question as to his name. The next question seems to be immaterial along with the next two. The two vital questions as I see it that were asked McCrone, the first one was, "Did you, between February 1 and 10, 1937, receive from Mr. Ron Pepple a sum of money which was to be given by you to another person?" McCrone in answer to that question refused to answer on the grounds it might incriminate him and he wouldn't be a witness against himself.

The Court: Upon what theory could an answer to that question be reasonably held to incriminate?

[58]

Mr. Shone: Would Your Honor allow me to read the next question so we can take both at the same time.

The next question is, the next serious proposition: "Did you, between February 1 and 10, 1937, receive from a person other than Ron Pepple, a sum of money which you paid subsequently to an-

other person?" That he said it would incriminate him.

Now, further answers and questions seem to be immaterial. Its just a revision of the warning that he understands these things, but those two questions are the vital questions in the proceeding whether he should or should not or could not answer those. That is whether he had a right to refuse.

Now, we understand that Mr. McCrone was a witness called in and regardless of what is alleged in the affidavit about the facts that William McCrone was not being investigated as to his income tax, or as to the violation of any Federal law, and also that it was another person other than William McCrone that was being investigated.

Now, in the first place, may it please the court, the income tax laws do not grant any immunity to a witness testifying before the Tax Commission. There are a good many cases in other lines of procedure such as before the Interstate Commerce Commission, the Bankruptcy Act, the Anti-trust laws, and others, in which the court will find a statute granting immunity to any witness who may testify as to, or answer any questions concerning a third party. Now, first we must firmly keep in mind the fact that under the Income Tax Law there is no immunity statute, so that if a witness going before a Commissioner appointed from the Treasury Department, or the party in charge, in order to protect himself if a question is asked which may incriminate him, whether a proceeding is pending against him or not, being [59] immaterial, it is his

duty because the privilege itself is personal to the individual and if he doesn't protect himself at that time and refuses to answer and stands on his constitutional rights he is forever deprived of that as a defense or against a prosecution. That evidence could be used against him and has been done.

In these two questions, may it please the court, as I view the court's attitude is whether or not he should answer each of these two questions.

The Court: The court has no position at all, I am simply groping in the dark and asking for information.

Mr. Shone: The proceeding is to compel him to answer those two questions.

The Court: It isn't a question of those two questions. The court made an Order and of that Order the court will take judicial notice.

That Order was that William McCrone appear at a designated time and place and give his testimony before Paul W. DeFoe, an Agent or officer of the Internal Revenue Department, of all matters and facts within his knowledge concerning the subject of the inquiry and investigation, now being carried on by such officer mentioned. That is the Order of the court he refused to obey. He appeared but refused to testify.

Mr. Shone: I will state it in another way. The question here is, as I view it, if he can claim immunity from answering those questions under the constitutional provision that he cannot be compelled to be a witness against himself he has not committed any contempt. If he is required by the constitution

to answer regardless of whether he claims a constitutional right, of course, he is guilty of contempt.

[60]

In the case of *In re Doyle*, 42 Federal 2nd, 686.

The Court: It seems to me this is rather untimely. I asked for authorities supporting your position and Mr. Maury said he had none. Now you commence to cite authorities.

Mr. Shone: The way I view it, Your Honor, is that we have a right now to show the first proceeding, the Motion to Quash, was sort of special appearance.

The Court: The Motion to Quash was denied. You have the reporter here to take it. I take it you want a record.

Mr. Shone: Yes sir.

The Court: I want it. Its not a reporter of my choosing but yours.

The court in effect there held by taking the allegations stated in the affidavit filed herein on April 26, 1938, to be true, it is shown as a matter of law that the person against whom the Order to show cause was issued has been guilty of a wilful disobedience of the lawful Order made by this court. That is the state of the record now.

As I said, I asked Mr. Maury very pointedly and on several occasions to produce some authority on his Motion to Quash and he said he had none and you produce some directly in front of him.

Mr. Shone: I would have said the same as Mr. Maury, because in our Motion to Quash the question of immunity, the privilege of immunity is not stated

in the Motion; that was on a question of counsel being present and that's all that's stated in the Motion.

Now, the question as to whether or not he is guilty of contempt previous in the proposition of whether he could claim immunity under the Fifth Amendment and refused to answer upon [61] the ground the answers to the questions may incriminate him, I take it its a showing under the plea of Not Guilty he has not wilfully violated any Order of this court, and by virtue of the Fifth Amendment he had a right to refuse to answer on the ground it would incriminate him even though he were only a witness. I intend to show the court authority to that effect.

The Court: You need no authority to that effect. It may reasonably be supposed that any answer he would give would tend to incriminate him or might reasonably be the basis for a criminal prosecution in the Federal jurisdiction your position is sound, but the mere statement by a witness that any answer he might give may tend to incriminate him does not lay a basis upon which a defense can be made to a contempt order issued, where it appears definitely upon the face of the record and without contradiction where the man charged has failed to do what the court directed specifically what he should do.

Mr. Shone: We analyze the question and the law on the question. We can easily see that any answer—or in answering it may incriminate him beyond any question.



The Court: You are tying your argument to two questions. There are a score of questions that are asked that could not by any possibility be expected to be answered in a way that would cause any difficulty to the man under examination. He refused to answer any.

Mr. Shone: All leading to the two questions.

The Court: It may all lead to the two questions, but he absolutely refused to obey the Order of the court by submitting to any examination. He went there and refused to answer.

Take the first question: "Mr. McCrone, you are here pursuant [62] to order 979 issued this date by the Honorable James H. Baldwin, Judge of the District Court of the United States, District of Montana, Butte. Is that correct?" He said: "yes sir". Now, he knew he was there by a court Order. That's the only question he answered. The next question: "Do you fully understand that the purposes of this inquiry in no way relate to any liability which you may be under with respect to Federal laws?" He refuses to answer that question.

Mr. Shone: Because there was a liability if he stated otherwise because there is no immunity statute, and if he went ahead and answered that would lead to other questions.

The Court: He said the answer to it would tend to incriminate himself and that I will not be a witness against myself. He gave the same identical answer to every question that was asked from there on. Now, I am asking for authorities which would support the view that his answer to that second

question, for instance, no matter what it may be could in any way tend to incriminate him or be a basis upon which a criminal prosecution within Federal law might be laid.

Mr. Maury: I wish to call to Your Honor's attention the case of *In re Doyle*, 42 Federal, second, 686, and I am reading the opinion of the District Court for the purpose of explaining the opinion of the Circuit Court of Appeals.

The Court: What District Court?

Mr. Maury: The District of the Southern District of New York.

The Court: Mr. Maury, its not necessary for you to read cases to me, merely cite them. I prefer to read them. If you have any comment which you wish to make upon a decision which you feel might on any theory be of assistance to the court [63] the court would be glad to hear it.

Mr. Maury: I want to compare this statement of fact with the statement of fact in the case at bar and show the very questions to be almost identical. The District Court found Doyle guilty of contempt and committed him for a period of 30 days or until he should answer.

The Court: Very well. Your position is that the questions in that case which were asked and remained unanswered are practically identical?

Mr. Maury: The Circuit Court of Appeals—the reason why I must *prefer* the Court to the District Court opinion is because the Circuit Court of Appeals of that Circuit reversed the opinion of the District Court in open court and without opinion of any kind at all.

The Court: Well, that's not very helpful to me. We will pass that case. Lets get down to some other.

Mr. Maury: The authority of the Circuit Court of Appeals reversing that case is 47 Federal Reporter, second series, U. S. v. William F. Doyle, page 1086. It seems that the questions were so plain that no opinion seemed to be necessary.

The Court: Lets pass to some other case in which written opinions were handed down.

Mr. Maury: There was a written opinion handed down in the case of U. S. against Aaron Burr.

The Court: What is the citation.

Mr. Maury: Well, there are four or five of those cases, written opinions; its 25 Federal cases, case No. 14692-E. Those four or five opinions are called A, B, G, D, E and F, etc., and I would like to read the opinion of Chief Justice Marshall. [64]

The Court: I am perfectly competent to read and prefer to do my own reading. If you wish to call my attention to your view of the case I am willing to listen.

Mr. Maury: The points in the case are that this privilege is in favor of a witness whether there is any proceeding against him or not.

The Court: We can agree with that. The question is: Does it appear on the face of the record that there is any reasonable probability that the answer to the question asked will in any way tend to incriminate the defendant or the person who is under questioning, and are the conditions such that it is reasonably probable that a Federal prosecution may be based upon it.

Mr. Maury: The first proposition of the Doyle case was that questions must be material; if they are immaterial then they are immaterial, immaterial to any prosecution or any kind of a case.

The Court: Lets get in step. There is no suggested prosecution of anybody. Its merely an inquiry for the purpose of determining what should be a proper income tax on a certain individual when made.

Mr. Maury: I wish to present authorities as I would like to get Your Honor's views.

The Court: If you have authorities give me the citation, and if you have comment on any case you submit I would like to hear it, but I don't have the time or inclination to sit here and listen to you read law. That is my position. My time is limited and I have much work to do just as important or more important than this matter, so I haven't time to listen to you read law. Give me the citations and your view of the testimony and I will do the reading and come to the conclusion I think proper. [65]

Mr. Maury: My view of this decision that in case of a witness whether there is any proceeding against him or whether there is any present liability to any proceeding against him, that he is permitted not to answer any questions if it is of such a description that an answer to it may or may not incriminate the witness according to the purport of that answer. It must rest with himself who alone could tell what it would be to answer the question or not. In such a case he say upon his oath that his answer would incriminate the court can demand no other testimony.

The Court: Are you reading from that case? I have given a definite order. I have always been chary of the power of the court, but I definitely told you I don't want you to stand in court and read cases I will be required to read in the library and I don't care to have that order further infringed upon. Give me the citations of the case you feel support your theory and I shall be glad to read them myself. If you have any comments upon the opinion as written I am willing to listen to them, but I am not willing to sit here and let you read cases.

Mr. Maury: I except.

The Court: Very well, exception noted, but that is the order of the court. Give me citations.

Mr. Maury: I have some here.

The Court: If you will please give them to me we will get along.

Mr. Maury: Wigmore on evidence, Vol. 4, paragraphs 2252, Note 2. Commonwealth vs. Cameron, Penn. 79, Atl. 169. Horstman vs. Kaufman, Penn. 39, Amer. Reports 802. Rose's Notes to Councilman vs. Hitchcock, Vol. 15 of Rose's Notes page 1002.

[66]

The Court: What is the citation of the case to which the note is appended?

Mr. Maury: I intended to read some excerpts from the Counselman case.

Mr. Shone: Counselman vs. Hitchcock, 142 U. S. page 562, 35 Law Addition.

Mr. Maury: 547, the case comments, Counselman vs. Hitchcock, 142 U. S. 547.



State vs. Naughton, 221 Missouri, 423, 120 S. W. 59-61. People vs. Reardon, N. Y. 134 American State Reports 866.

And particularly about that case, Your Honor, that it appears that the examination was before the Controller of Revenue that it was held that the immunity applied.

The Court: Is it a Federal case?

Mr. Maury: It is not, but it is mentioned in Federal cases.

The Court: You said the hearing was before the Controller of Currency?

Mr. Maury: I said Controller of the Revenue of the State of New York. It said that case holds that the immunity applies equally in such a hearing as any hearing or trial before a court.

The Court: There is no question about that. I can agree to that. That appears to me to be the law but it doesn't support the contention you are making that the witness alone shall have the right to determine whether he shall or shall not answer.

Mr. Maury: Further we refer the court to *Miskinnins vs. Shaver*, Wyo. 49 L. R. A. 831—58 Pac. 421. I wish to comment also—

Mr. Shone: *U. S. vs. Herron*, California District Court 28 Federal Sec. 122; *U. S. vs. Kimball*, N. Y. 117 Federal 156, 160. [67] *Maloney vs. U. S.* 79 Federal, Section 566 at 580.

The Court: Very well. Now we are past the citation of authorities. Have you any desire at this time to offer any proof?

Mr. Maury: Yes.

The Court: Very well. Have your witness sworn.

WILLIAM McCRONE,

called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Maury:

Q. McCrone, you were asked a question before or by the Examiner, Mr. DeFoe, as follows: "Do you know Mr. Ron Pepple?" And you refused to answer that question, and made answer "I refuse to answer that question. The answer to which would tend to criminate myself. I will not be a witness against myself". Would the answer to that question have had a tendency to incriminate you?

Mr. Brown: Objected to as calling for a conclusion of the witness.

The Court: Objection is sustained.

Mr. Maury: We except.

We make an offer of proof.

The Court: Well, it will be considered on the record that he would answer "Yes" in his opinion. The answer there is obvious and it doesn't seem to be necessary to take time here.

Mr. Maury: "Mr. McCrone, under what laws did you believe that the answer to that question would tend to incriminate you?"

A. United States Laws.

Mr. Brown: I move that answer be stricken as there couldn't [68] possibly be any law in the United States making it a criminal offense and subject him to any prosecution because he might know the man he was questioned concerning.

Mr. Maury: I would like to argue that.

(Testimony of William McCrone.)

The Court: The answer may stand, but it appears to me that the proper mode of procedure is for him to state facts and the court will determine whether it is law. Candidly I am not interested in his view of whether it would or would not violate a Federal law. I would like to know the facts and from them I would determine what is the case. If he were being prosecuted criminally it might be a matter of concern for the purpose of informing the court of his mental attitude in the event he should be found guilty, but only for the purpose of determining what punishment would be inflicted for his violation of the order. Ask the next question.

Mr. Maury: You were asked by Mr. DeFoe at this hearing this question: "Did you sometime between February 1 and 10, 1937, accompany Mr. Ron Pepple from Butte to Helena, Montana?" You made answer: "I refuse to answer that question. The answer to it would tend to criminate myself. I will not be a witness against myself".

Under what law did you believe that?

The Court: That has gone far enough. We will just make a short record so you may appeal.

Mr. Maury: I didn't hear.

The Court: That form of question has gone far enough. Its not for him to determine under what law he might be prosecuted.

Mr. Maury: His belief as to the law.

The Court: What purpose has that. Put on the record your reason, your reason for the refusal to obey the order made. [69]

(Testimony of William McCrone.)

Mr. Maury: If the court please—

The Court: The only order the court would make in this case is that he be confined until he comes into court and makes the answers the court ordered he shall make, that is the answers to questions properly asked.

Mr. Maury: We except.

The Court: He is not here for the purpose of punishment. The request is he be confined until he answers the questions asked as ordered by the court.

Mr. Maury: That is punishment.

The Court: For whom? I have ruled I don't care to have you ask a certain question and give a certain answer which appears on the face of the record as having been asked and answered.

Mr. Shone, will you take control of this case.

Mr. Maury: I except.

Mr. Shone: I take the same position as counsel.

The Court: I don't care to deal with counsel who fuses to obey the order of the court.

Mr. Shone: I take the same position as counsel that the question is proper to be asked the witness and if the court rules it is not we should be allowed to make our proof on the refusal of the court.

The Court: I have made a general order that the court will not in this proceeding consider the attitude of the witness with reference to what law he bases his supposed exemption from answering. The court will determine that.

Mr. Shone: I would take the same position as counsel.

The Court: Very well, the court has ruled we will

(Testimony of William McCrone.)

proceed no further along this line. He has two questions on the record. The answers are identical throughout the proceeding [70] excepting the first question. The court has ruled it is not interested in his belief but wants to be informed of the facts on which it can draw an intelligent judgment, whether there is any reasonable probability any answer he might make would in any way tend to incriminate him. That is the position of the court and that's the rule and we will proceed with something else.

Mr. Shone: Can't we make an offer of proof what answer the witness would make to that question, that he would answer it was the laws of the United States.

The Court: We will take it for granted he would answer the same to each of these questions.

Mr. Maury: In respect to the court's order refusing to allow me to appear further in the case——

The Court: I haven't made any order you shouldn't appear further in the case. I simply said you must bow to the order the court has made that you would ask no further questions of the kind you were asking.

Mr. Maury: Note our exception.

Mr. Shone: That is all.

Mr. Brown: That is all.

The Court: Any further proof?

Mr. Shone: None, Your Honor.

The Court: The matter will be taken under advisement until 10:00 o'clock tomorrow morning. Mr. McCrone will return here at that time.

(Court stands adjourned until Thursday, April 28, 1938, at 10:00 o'clock A. M.) [71]



(Thursday, April 28, 1938, 10:00 A. M.)

The Court: Cause No. 979, In the Matter of the Application for attachment against William McCrone.

I have devoted my time as far as possible to a consideration of the questions presented and a reading of the cases cited by counsel for Mr. McCrone. Up to this time I have not been able to complete reading all of those cases and a running down of the citations which counsel neglected to give me any assistance in. I have a case here decided in 1801. We have no citation of cases more recent bearing upon the decision in that case. However, the question is one which involves a consideration of a claim of an individual that a constitutional right guaranteed to him is being violated, and for that reason the court feels inclined to enter upon an independent investigation of the question for itself. Time will be required to do that and for that reason this matter is continued until 3:00 o'clock this afternoon. Mr. McCrone will be in court here at that time. 3:00 o'clock this afternoon. The court will stand in recess until then.

(3:00 o'clock P. M. Thursday, April 28, 1938).

The Court: In the Matter of Contempt of William McCrone:

Cause No. 979. Heretofore an affidavit was filed by a duly credited officer of the United States requesting that one William McCrone be required to appear before him at a time and place to be specified for the purpose of answering questions to be asked with reference to certain matters not in any way affecting the witness McCrone.

A hearing was had upon the matter and it was ordered by the court on April 23, 1938, that McCrone appear at a time and place therein specified before Paul W. DeFoe, an agent and [72] officer of the Internal Revenue Bureau, and there testify as a witness concerning matters within his own personal knowledge. It appears from the record now before the court that the witness McCrone did appear at the time and place specified; that he was duly sworn as a witness and was asked eleven (11) questions, the first of these questions being "Mr. McCrone, you are here pursuant to Order No. 979 issued this date by the Honorable James H. Baldwin, Judge of the District Court, United States District of Montana, Butte. Is that correct". The answer given "yes sir". In response to each of the other questions the witness said "I refuse to answer that question. The answer to it would tend to criminate me. I will not be a witness against myself". Upon this refusal to answer, and in question nine Mr. DeFoe asked, "Are we to understand that you will continue to refuse to answer for the reasons given with respect to any similar question which may be propounded to you". To which the answer given is "I refuse to answer that question. The answer to it would tend to criminate me. I will not be a witness against myself".

After the refusal of the witness to answer the ninth question, or the eleventh question rather, the hearing was suspended and later and on April 26th an affidavit was filed herein by Mr. DeFoe setting up the facts containing as Exhibit A, a copy of the

Order made by this court, and a copy of the questions asked and the answers given by McCrone, and upon the filing of the affidavit an Order to Show Cause issued requiring the witness McCrone to appear here to show cause why he should not be punished for contempt.

The witness McCrone appeared at the time specified in the Order to Show Cause and filed a Motion to Quash the Order to [73] Show Cause which was argued, submitted and overruled, and thereupon the witness McCrone was sworn in court and asked several questions, whereupon the court said that it would be taken as true for the purposes of this matter that other answers given by the witness to questions of the same kind would be identical with those that he had already given. The witness McCrone was then withdrawn from the witness stand and the matter was then by the court taken under advisement.

At three o'clock in the afternoon on April 28, 1938, the hearing was resumed and the court said:

Since taking the matter under advisement I have made a careful examination and critical study of each of the cases cited by counsel for McCrone in this matter, for the purpose of determining whether the position taken by the witness is justified upon the facts as they appear in this case in court. From a critical examination of these cases it occurs to me that counsel has failed to apply the elementary principle of law that each case must be considered in the light of its own circumstance and that the

courts deal with concrete propositions, specific questions and not with generalities. [74]

Thereupon the court reviewed and commented on the cases cited by counsel for William McCrone and the following proceedings were had:

The Court: I know of no reasonable theory upon which a direct answer to any of the ten questions that Mr. McCrone refused to answer could in any way tend to incriminate him, or could by any chance furnish a link in the chain of evidence necessary to convict him of a Federal crime. He has the direct assurance of a Federal Agent acting within the scope of his authority that the matter under investigation does not and cannot in any way affect Mr. McCrone; and under that condition I hold that he wilfully violated a lawful Order of the court requiring that he attend before Mr. DeFoe at the time and place specified in the Order by refusing to give a direct and positive answer to each of the questions set out in Exhibit B, attached to the affidavit filed herein on April 27, 1938, and I direct that the Marshal take him into custody and keep him in confinement in some suitable jail or place of imprisonment until such time as he shall purge himself of this contempt by answering directly each of the [91] questions asked which he refused to answer.

The District Attorney will prepare a proper Order in the usual form.

Mr. Maury: The defendant, William McCrone, excepts to each and all of the decision, Order that he be confined, opinion of the court, and particularly excepts to the finding of the court that he did

not state whether it was under state or Federal law. The defendant further excepts that the court in its opinion, finding, sentence and decision has not taken into consideration, or at least not spoken of the state of the record, that McCrone plead not guilty at the opening of this hearing.

The Court: The record will speak on that. Upon the insistence of counsel a plea of Not Guilty was entered. Counsel was clearly in error and so was the court in permitting that procedure. This is not a proceeding of a criminal kind; it is not a criminal contempt. Those points are very clear.

Mr. Brown: As to the record, I assume the record on that will show when that request was made I objected as I did.

The Court: Yes, and that the plea was improper and we are not dealing at all with a criminal matter.

Mr. Shone: We except to the ruling of that matter at this time. [92]

Have you prepared the formal Order.

Mr. Brown: I have prepared a form of Order.

The Court: The Court will stand in recess for a few minutes and Mr. McCrone will remain in court in the custody of the officer.

The Court: In this matter The Order of the court is as follows:

[Title of District Court and Cause.]

Order.

This matter coming on regularly to be heard before the Honorable James H. Baldwin, Judge, on this the 27th day of April, 1938, the applicant being



represented by R. Lewis Brown, Assistant Attorney of the United States, in and for the District of Montana; and William McCrone being personally present in court and represented by his counsel, H. L. Maury and A. G. Shone, thereupon, and upon the opening of court, counsel for the said William McCrone filed herein a motion to quash and affidavit of H. L. Maury. The motion to quash was argued to the Court by counsel and was by the Court overruled and denied; thereupon [93] and at the request of counsel for William McCrone, made in open court, and over the objections of the District Attorney, the said William McCrone was permitted to and did enter a plea of not guilty; and thereupon the said William McCrone was by his counsel called as a witness and sworn and testified in his own behalf, and thereupon no further testimony being offered or received, the matter was by the Court taken under advisement until 10:00 o'clock A. M. of April 28, 1938, and at that hour until 3:00 o'clock P. M. on that day.

The court having considered all of the matters and proceedings had and done in the above entitled matter, and all of the evidence, including the affidavit of Paul W. DeFoe, filed, and being fully advised in the premises, finds that all of the matters, facts and statements set out and contained in the affidavit of Paul W. DeFoe, filed herein on April 26, 1938, are true and so finds that William McCrone presented himself at the office of the said Paul W. DeFoe, Special Agent of the Bureau of Internal Revenue of the United States at 4:00 o'clock P. M.

on the 23rd day of April, 1938, as he had been directed and ordered to do by this court, and further finds that at said time and place the said Special Agent of the Bureau of Internal Revenue of the United States, Paul W. DeFoe, commenced to interrogate the said William McCrone and attempt to take the testimony of the said William McCrone about matters and facts within his own personal knowledge that were pertinent and material to the subject of the inquiry then being carried on and conducted by the said Paul W. DeFoe, and the Court further finds that the said William McCrone, at said time and place and before the said officer, did not give his testimony to said officer of the matters and facts within his knowledge concerning [94] the subject matter of the inquiry and investigation then being carried on by the said agent and officer, Paul W. DeFoe, or any of them, and did not, at said time and place, make a full, true, complete, accurate and truthful disclosure of all matters and facts within his knowledge, material and pertinent and concerning the subject matter of the investigation being carried on by such officer, or did not make any disclosure whatsoever, or at all, of said matters and facts, or any of them, or any disclosure either in whole or in part and wilfully and deliberately and wrongfully disobeyed the order and command of this Court entered herein on the 23rd day of April, 1938, and did wilfully and deliberately and wrongfully disobey said order of said Court and failed, refused and neglected to give his said testimony as required by said order to said officer, or at

all, and wilfully and deliberately and wrongfully failed and refused to make a full, true, complete, accurate and truthful disclosure of the matters and facts within his knowledge, material and pertinent and concerning the subject matter of the investigation then being carried on by such officer, or to make any disclosure whatsoever, or at all; and the Court further finds that the said William McCrone, when he appeared before the said officer as commanded by this Court, informed the said officer that he did not intend to and would not give his testimony or answer his questions, or give him any information of any material facts that he had within his knowledge concerning the subject matter of the investigation being carried on by the said Paul W. DeFoe, as such officer and agent; and the Court further finds that the said William McCrone, by his acts and conduct and refusal to obey the said order of this court, was in defiance and contempt of this court and of its said order and of its authority, and that the said [95] William McCrone is now in contempt of this said court and its said order and its authority and has and continues to disobey its said order.

The Court further finds that the said William McCrone did not on the 27th day of April, 1938, or at all, and upon his appearance before the above entitled Court, in obedience to the rule and order to show cause issued by this Court, show any cause whatsoever, or was any cause shown whatsoever by him or on his behalf, why he should not be held in contempt of the above entitled court, or why he should not obey the order of this Court,

dated April 23, 1938; the Court further finds that the prayer of the affidavit filed herein should be granted.

Wherefore, by reason of the law and the premises, it is ordered, and this does order, that the said William McCrone be and he is hereby committed to the custody of the United States Marshal for the District of Montana to be by said United States Marshal confined in the county jail of Silver Bow County, Montana, and to be held in such confinement in such county jail by said United States Marshal until the said William McCrone purges himself of his said contempt by obeying the order of this Court, duly given and made on the 23rd day of April, 1938, by giving his testimony before Paul W. DeFoe, an agent and officer of the Internal Revenue Bureau, of all matters and facts within his personal knowledge concerning the subject matter of the inquiry and investigation now being carried on by the said Paul W. DeFoe, as such officer and agent, and by making a full, true, complete, accurate and truthful disclosure of all matters and facts within his knowledge, material and pertinent and concerning the subject matter of the investigation now being carried on by such officer. [96]

It is further ordered that a copy of this order, duly attested by the Clerk of this Court under the seal of the Court, shall serve as a sufficient warrant for the Marshal to carry this order into execution.

Dohe and dated in open court, April 28, 1938.

**JAMES H. BALDWIN,**

Judge of the above entitled Court.

Mr. Maury: William McCrone excepts to the Order just made; William McCrone in addition to excepting generally to all of the Order points out and suggests to the court that some certain time limit should be put in the Order of confinement as an alternative. The Order as it stands might be an imprisonment for life. I suggest that Orders similar to those in New York where there is a 30-day time limit.

The Court: There are such orders but that is punishment that he be confined for 30 days or until such time he shall have complied with the order. The Order will be filed.

Mr. Maury: Exception.

The Court: It is based upon the form directed and suggested by the Supreme Court of the United States in *Gompers vs. Buck Stove & Range Company*, 221 U. S. 418, 441-'2.

Mr. Maury: Further, McCrone suggests and objects that the Order is too general requiring him to answer of all matters and facts within his personal knowledge concerning the subject matter of the inquiry and investigation. McCrone says that that should be limited. McCrone also assigns that any question of purgation shall not be confined to Paul W. DeFoe but to any authorized officer of the United States government. Paul DeFoe might become unable to act for various reasons, death and disability, resignation or anything like that, and the Order should be amended [97] accordingly.

The Court: The court will stand in recess until Monday morning.



Mr. Brown: If the court please, might that be conveniently made until some time tomorrow. I have removal proceedings.

Mr. Maury: I was waiting for an order on that last suggestion. We ask the court at this time for time in which to prepare, serve and file a Bill of Exceptions.

The Court: How much time do you think would be reasonable?

Mr. Maury: I would like 15 days.

The Court: Any objection?

Mr. Brown: None on our part.

The Court: Very well, let the record show upon the request of the attorney for Mr. McCrone he is granted 15 days from this date within which to prepare, serve and lodge with the Clerk his proposed bill of exceptions on rulings of the court made during this hearing.

Mr. Maury: Now, it is our purpose to appeal or seek some appropriate review of the proceedings in the Circuit Court of Appeals and we would ask Your Honor to fix bail announcing the amount.

The Court: There will be no bail fixed. This is a civil proceeding. It has none of the elements of a criminal action. The prayer of the affidavit was in part that the witness McCrone should be imprisoned in some proper jail until such time as he shall obey the order of this court heretofore entered, a copy of which is attached as Exhibit A to the affidavit filed herein on April 27, 1938, unless he purge himself of said contempt. The Order of the court is in conformity with that prayer and the form as fixed

by the Supreme Court of the United States in the case of Gompers vs. Buck Stove Company, 221 U. S. 418, 441-'2. [98]

Mr. Maury: William McCrone excepts to the announcement of the court that no bail be allowed.

The Court: You can have an exception to the refusal of the court for bail. Your request for bail was denied.

Mr. Maury: We except.

The Court: The exception will be noted and the Marshal will take Mr. McCrone into custody.

The court will stand in recess until 10:00 o'clock tomorrow morning.

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The foregoing is all the testimony and evidence introduced upon the hearing of said cause.

And now, within the time allowed by law and granted by the court, defendant present this, his proposed Bill of Exceptions, and ask that the same may be signed, settled and allowed as true and correct.

H. LOWNDES MAURY,

A. G. SHONE,

Attorneys for Defendant.

The undersigned Judge who tried the above entitled cause, hereby certifies that the above and foregoing, having been amended as directed, is a full, true and correct Bill of Exceptions in said cause and contains all evidence introduced, proceedings had and exceptions taken at the trial of said cause

and the same is accordingly signed, settled and allowed and ordered filed this 6th day of May, 1938.

JAMES A. BALDWIN,

Judge.

Service of within Bill of Exceptions admitted and copy received May 2, 1938.

JOHN B. TANSIL,

U. S. District Attorney for Montana.

By R. LEWIS BROWN,

Deputy.

[99]

[Endorsed]: Lodged May 2, 1938. Filed May 6th, 1938.

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[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

To the United States of America, and to John B. Tansil, United States District Attorney for the District of Montana, and to R. Lewis Brown, Deputy United States District Attorney for the District of Montana:

William McCrone, who is appealing to the Circuit Court of Appeals of the United States, in and for the Ninth Circuit, from a judgment and order herein made, does assign that the Honorable, The District Court, which tried the case, committed the following errors:

1.

The court erred in requiring William McCrone, after he had objected and claimed the privilege of

not answering self-incriminatory questions, to appear before Paul W. DeFoe and make answer generally to all questions asked or that may be asked by the said Paul W. DeFoe.

## 2.

The court erred in finding William McCrone guilty and sentencing him to be imprisoned in the Silver Bow County Jail at Butte, Montana, for that William McCrone has not been guilty of contempt of court but has merely asserted and stood upon his privilege granted by the Fifth Amendment to the Constitution of the United States, permitting him to refuse to answer any question that tended to incriminate him under the laws of the United States.

[100]

## 3.

The court erred in finding William McCrone guilty of criminal contempt after a plea of not guilty, and when no evidence whatever was introduced in evidence against William McCrone.

## 4.

The court erred in holding that the proceeding was merely one of civil contempt and not a punishment for criminal contempt.

## 5.

The court erred in not dismissing the proceeding upon the motion of William McCrone and on the ground that there was no party named as plaintiff or defendant in the proceeding, and particularly on

the ground that the United States of America was not named as plaintiff.

6.

The court erred in denying and overruling the motion to quash the proceedings herein on the grounds stated herein.

7.

The court erred in entering judgment against appellant and sentencing him to confinement in the County Jail of Silver Bow County, at Butte, Montana.

8.

The court erred in denying William McCrone's application to be given his liberty pending appeal on furnishing proper security and bail for his re-appearance in court and obedience to the final orders of the court.

9.

The court erred at the commencement of the hearing and during the hearing in shifting the burden of proof upon this appellant to prove that he was not guilty of the contempt charged against him.

10.

The court erred in this case of criminal contempt in fixing [101] and assessing an indefinite punishment.

WILLIAM McCRONE,  
By H. LOWNDES MAURY,  
A. G. SHONE,  
Of Butte, Montana.  
Attorneys for William McCrone.



Service of the foregoing assignment of errors acknowledged and copy received this 2 day of May, A. D. 1938.

JOHN B. TANSIL,

United States District Attorney  
for the District of Montana.

By R. LEWIS BROWN,

Assistant United States District  
Attorney for the District of  
Montana. [102]

[Endorsed]: Filed May 2nd, 1938.

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[Endorsed]: No. 8836. United States Circuit Court of Appeals for the Ninth Circuit. William McCrone, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed May 9, 1938.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

**No. 8836**

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**IN THE**

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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**WILLIAM McCRONE,**

**Appellant,**

**vs.**

**UNITED STATES OF AMERICA,**

**Appellee.**

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**Upon Appeal from the District Court of the United States  
for the District of Montana,**

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**PROCEEDINGS HAD IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.**

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**PAGE**

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. 8836

In the Matter of the Application for an Attachment  
Against William McCrone.

PETITION FOR AN ORDER OF ADMISSION  
TO BAIL.

To the Honorable, the above entitled Court:

Now comes William McCrone of Butte, Montana,  
a native citizen of the United States, and respectfully states to the Court:

That he is against his will confined in the County jail of Silver Bow County, in the District of Montana by the United States Marshal of said district, acting under an order of the District Court of the United States, in and for the District of Montana, made on the 28th day of April, 1938, in a certain proceeding entitled, after the title of the District Court, "In the Matter of the Application for an Attachment against William McCrone", which was in reality, regardless of such title, a prosecution by the United States of America for the punishment of petitioner for alleged criminal contempt away from any immediate presence of the court; that there has never been pending any suit or proceeding of a civil nature between persons or corporations in the progress of which any act charged against petitioner could have been done by him; nor is the pendency of any such civil suit or

proceeding alleged in any paper writing filed against petitioner or in any evidence against petitioner, or in any words of Court or counsel.

That an appeal has been duly perfected to this Court by petitioner and the record thereof with full Bill of Exceptions therein is now on file in the office of the Clerk of this Court; to the said complete records this petitioner refers and respectfully requests inspection thereof before the court decides whether or not petitioner should be given his liberty on proper and sufficient bail, pending a decision of the said appeal by the Court.

That William McCrone has not elected to enter upon the service of his sentence of the District Court.

That William McCrone excepted to the orders of the District Court refusing to quash the proceedings, excepted to the order of the said Court finding him guilty and ordering him confined, and immediately on the said order being signed and ordered entered by the Court; requested of the District Court that he be allowed his liberty on bail pending an appeal; that the Court denied the request and McCrone excepted; that after the appeal was perfected, McCrone stated to the District Court that his appeal had been taken and again requested the District Court to order him released from confinement pending appeal, provided he furnish sufficient and proper bail; that the District Court denied this request and McCrone excepted.



And with all due respect to the rulings of the learned District Court William McCrone avers that the appeal involves substantial questions which should be determined by the Appellate Court as follows:

(a) May a person be compelled, against his will, to answer on oath (or affirmation) to a revenue officer of the United States, when no criminal prosecution is pending against himself, and no civil proceeding pending at all germane, any question the answer to which tends to criminate him; can he be forced to be a witness against himself?

(b) Has the nature of this proceeding been misapprehended by the District Court in treating it as for "civil contempt" instead of as a charge of "criminal contempt"; can there be "civil contempt" when there is no civil legal proceeding pending at all germane?

(c) If it is a charge of "criminal contempt" (as McCrone asserts it to be) errors appear sufficiently serious to place the order of imprisonment beyond the jurisdiction of the District Court or Judge for

(1) No process in the name of the United States has been issued against McCrone. (2) At the hearing no evidence was introduced against McCrone by affidavit or word of mouth. (3) After plea of not guilty he stated that he refused to answer the questions because the answer would criminate himself under United States law.

(d) There is no act of Congress granting immunity from prosecution on testimony given in investigations by Revenue Officers.

(e) That no promise of immunity from prosecution on any testimony he might give against himself has ever been made to McCrone by any officer of the United States with authority to bind the United States to keep such promise.

(f) That there was no person, government, or entity, named as plaintiff against McCrone.

That the offense of which McCrone was found guilty is not of the grade of felony.

Wherefore, William McCrone prays that the Court make order that he be given his liberty pending decision of his appeal herein upon his furnishing good and sufficient sureties for his appearance as required by law in an amount to be fixed by this Court, and such sureties to be approved by the presiding judge or Clerk of the District Court of the United States for Montana, Butte Division.

WILLIAM McCRONE

Appellant.

H. LOWNDES MAURY,  
Of Butte, Montana.

A. G. SHONE,  
Of Butte, Montana,  
Attorneys for William McCrone.

Service of the foregoing petition for an order of admission to bail admitted and copy received this 5th day of May, A. D. 1938.

JOHN B. TANSIL,

United States District Attorney  
for Montana.

By P. LOUIS BROWN, a

Assistant United States District  
Attorney for Montana.

[Endorsed]: Filed May 9, 1938. Paul P. O'Brien,  
Clerk.

[Title of Circuit Court of Appeals and Cause.]

OBJECTIONS TO AN ORDER ADMITTING  
McCRONE TO BAIL

Comes now the Attorney of the United States, in and for the District of Montana, and objects to the Honorable, the above entitled Court, or any of its Judges, making any order admitting William McCrone to bail as prayed for in his petition on file herein, upon the grounds and for the reasons following, to-wit:

I.

That the Court, or any of its Judges, are without jurisdiction to make such order for the reasons:

That jurisdiction of the said proceedings is in the District Court of the United States for the District of Montana;

That the said proceedings have not been removed to this court, so as to vest it with jurisdiction to make any order whatsoever or to review any proceedings had in the District Court of the United States for the District of Montana in said proceedings, by any appeal effective for such purpose.

## II.

That the petition for an order of admission to bail does not contain any showing of facts sufficient to authorize the granting of said petition and the admission of the said McCrone to bail.

## III.

That the records certified to the court does not show a condition or state of facts which would authorize the granting of the petition of the said McCrone and his admission to bail, or would warrant or authorize a holding that the District Court of the United States for the District of Montana abused its discretion in not admitting the said McCrone to bail.

## IV.

That it does not appear from the said petition or from the records certified to this Court that there is any substantial question involved which should be determined by this Court.

Dated May 9, 1938.

R. LEWIS BROWN,

Assistant Attorney of the United States, in and for the District of Montana.

Service of the foregoing objections and Memorandum of Points and Authorities acknowledged and copy received at San Francisco, California, this 9th day of May, 1938.

H. L. MAURY

A. G. SHONE

Attorneys for William McCrone.

[Endorsed]: Filed May 9, 1938. Paul P. O'Brien, Clerk.

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In the District Court of the United States in and for the District of Montana.

No. 979

In the Matter of the Application for an Attachment Against William McCrone.

**ORDER**

The Attorney of the United States, in and for the District of Montana, having filed a motion for an order of attachment against the said William McCrone, and it appearing from the motion of the said Attorney and from the affidavit of Paul W. DeFoe filed herein, in support of said motion, that the said Paul W. DeFoe is a Special Agent of the Bureau of Internal Revenue of the United States, and acting under the direction of the Commissioner of the Bureau of Internal Revenue of the United States of America, in making certain investigations in Butte, Montana, as to the correctness of certain



income tax returns heretofore filed as required by the laws of the United States; and it further appearing to the Court that in the course of such investigation in the performance of his official duties as required by law, he duly and regularly issued a subpoena to the said William McCrone requiring the said William McCrone to appear before him at room 306 of the Post Office building in Butte, Montana, on the 21st day of April, 1938, and to give testimony in the matter of the income tax return under investigation by the said agent.

And it further appearing to the Court that the said subpoena was lawfully issued and duly and regularly and lawfully served upon the said William McCrone and the said William McCrone was compelled to obey such subpoena and to give such information as was necessary, pertinent and material concerning the matter under investigation and within his personal knowledge; and it further appearing to the Court that the said William McCrone refused to give any information whatsoever to the said officer of the United States, or to obey the said subpoena and it further appearing to the Court that a writ of attachment, as prayed for herein, should be issued as required by the provisions of Section 1523 of Title 26, U. S. C.

Now, Therefore, It Is Ordered, and this does order and command you, the said William McCrone to be and appear before the above entitled Court, at its court room in the Post Office building in the City of Butte, County of Silver Bow, State and Dis-

trict of Montana, on April 23rd, 1938, at the hour of 10 o'clock A. M., then and there to show cause, if any you have, why you should not be required to obey the command of the said subpoena, and to submit yourself to interrogation by the said Paul W. DeFoe, Special Agent as aforesaid, and to give such information concerning the subject of his official inquiry as may be within your knowledge.

[Title of Cause.]

**ORDER**

Because of the fact that there is no United States Marshal, or Deputy United States Marshal at present in Butte, Silver Bow County; within the state and District of Montana, to serve the process of the Court in the above entitled cause,

It is Ordered and Directed that the Sheriff of Silver Bow County, Larry Weir, or any of his deputies, are hereby authorized, empowered and directed to make service of the process of the Court in the above entitled matter, that would otherwise be made by the United States Marshal if he or any Deputy Marshal were present and able to make such service.

Entered in open Court at Butte, Montana, April 22, 1938.

C. R. GARLOW,

Clerk.

By HAROLD L. ALLEN,

Deputy Clerk.

[Title of District Court and Cause.]

The above-entitled matter came on regularly for hearing at the hour of ten o'clock in the morning this day, Mr. R. Lewis Brown, Assistant Attorney of the United States for the District of Montana, appearing for the United States, and Mr. H. L. Maury appearing on behalf of William McCrone. Mr. William McCrone was present in Court in person.

Mr. Maury asked the permission of the Court to answer herein at 2:00 P. M. today. The District Attorney stated to the Court that the continuance of this matter until said time is agreeable to the United States, whereupon Court ordered that the order to show cause and the hearing thereon be continued to 2:00 P. M. today.

At 2:00 o'clock P. M. this day, all parties being present as before, Mr. Maury read to the Court and filed the Answer of William McCrone herein. Thereupon after the statements of Mr. Maury and Mr. Brown, the Court signed and ordered filed and entered the following written Order:

[Title of Cause.]

#### ORDER

This matter coming on regularly to be heard on this the 23rd day of April, 1938, before the Honorable James H. Baldwin, Judge, the United States being represented by R. Lewis Brown, Assistant Attorney of the United States, in and for the District of Montana, and William McCrone being per-

sonally present in Court and represented by his counsel, H. L. Maury, the matter having been fully presented, and submitted to the Court for consideration and decision;

And it appearing to the Court that all the matters, facts and statements set out and contained in the affidavit upon which this proceeding was based are true and that Paul W. DeFoe is and at the times mentioned in the said affidavit was an agent and officer of the Bureau of Internal Revenue and acting under the directions and instructions of the Commissioner of the Bureau of Internal Revenue of the United States, and that on the 21st day of April, 1938, the said Paul W. DeFoe, as such officer and agent of the Bureau of Internal Revenue and of the United States, was lawfully acting within his authority and in the performance of his official duties, and that the subpoena issued to the said William McCrone by the said Paul W. DeFoe on the 21st day of April, 1938, was in all respects duly and regularly and lawfully issued and served by said officer and agent upon the said William McCrone, and that the said William McCrone was lawfully required thereby to appear before the said Paul W. DeFoe, as such officer and agent of the Internal Revenue Bureau of the United States and to submit himself in attendance before such officer at the time and place mentioned in said subpoena, and to give his testimony of matters and facts within his knowledge about the subject matter of the investiga-

tion being carried on by such officer and agent; and the Court further finds that the said William McCrone wrongfully failed and refused to give any testimony or to make any statement whatsoever to the said officer and agent of matters and facts within his personal knowledge concerning the subject matter of the inquiry being carried on by the said agent, and which were material and pertinent to the subject matter of the said inquiry, and that the subject matter of the said inquiry and investigation was not of or concerning the said William McCrone, or of any income tax return of the said William McCrone that he did or did not make; the Court further finds that the motion of the government herein should be and is hereby granted.

Wherefore, It Is Ordered, and this does order, that you, William McCrone, be and appear at room 306 of the Post Office Building, in the city of Butte, County of Silver Bow, State and District of Montana, at the hour of 4 o'clock in the afternoon, on the 23rd day of April, 1938, and give your testimony before Paul W. DeFoe, an agent and officer of the Internal Revenue Bureau, of all matters and facts within your knowledge concerning the subject matter of the inquiry and investigation, now being carried on by the said Paul W. DeFoe, as such officer and agent, and if during the giving of your said testimony, it becomes necessary that an adjournment or continuance be had before you have completed giving your said testimony, that you again appear before the said Paul W. DeFoe, as such officer and



agent, at the same place in the Post Office Building at such time as may be fixed by him, which shall be between the hours of 9:00 o'clock A. M. and 12:00 o'clock noon, and 1:00 o'clock and 5:00 o'clock in the afternoon, and continue such attendance until you have given all of your testimony and made a full, true, complete, accurate and truthful disclosure of all matters and facts within your knowledge, material and pertinent and concerning the subject matter of the investigation now being carried on by such officer.

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Mr. Maury on behalf of William McCrone objected to the use of the language in said order beginning with the third word on the final page of said order and continuing to end of said order, to-wit: "made a full, true, complete, accurate and truthful disclosure of all matters and facts within your knowledge, material and pertinent and concerning the subject matter of the investigation now being carried on by such officer", and moved the court to insert in said order in lieu of said language objected to, the following words: "that you are not required to be a witness against yourself or answer any questions which might incriminate you or have a tendency to incriminate you".

Court thereupon ordered that the order as signed and ordered filed and entered will stand. Mr. Maury on behalf of William McCrone excepted to the Court's refusal to amend its order as requested.

Upon the application of his attorney William McCrone is granted to and including Monday, April 25, 1938, in which to prepare and serve upon the District Attorney and lodge with the Clerk of this Court his proposed bill of exceptions upon the refusal of the Court to amend the order as requested by him.

Entered in open Court at Butte, Montana, April 23, 1938.

C. R. GARLOW,

Clerk.

By HAROLD L. ALLEN,

Deputy Clerk.

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[Title of District Court and Cause.]

**RULE AND ORDER**

It appearing to the Court from the affidavit of Paul W. DeFoe, a Special Agent and officer of the Bureau of Internal Revenue of the United States, that William McCrone has disobeyed the order and judgment of this Court of date the 23rd day of April, 1938, and has and does hold the Court, its authority and its said order and judgment in disregard and contempt, and it appearing to the Court that it is proper that a rule and order to show cause be issued as prayed for in said affidavit;

Now, Therefore, It Is Ordered, and this does order, and command, you the said William McCrone to be and appear before the above entitled court at

its court room in the Post Office building in the city of Butte, County of Silver Bow, State and District of Montana, on April 27, 1938, at the hour of 2 o'clock P. M., then and there to show cause, if any you have, why you should not be punished for your disobedience of the said order of this court of date April 23, 1938, and for your acts and conduct in holding this said Court, its authority and its said order in disregard and contempt.

. Entered in open Court at Butte, Montana, April 26, 1938.

C. R. GARLOW,

Clerk.

By HAROLD L. ALLEN,

Deputy Clerk.

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CERTIFIED COPY

United States of America,  
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the annexed and foregoing is a true and full copy of the original Minute entry of April 22nd, 1938, the Minute entry of April 23rd, 1938, and the Minute entry of April 26th, 1938, in the matter of the Application for an Attachment against William McCrone, Case No. 979, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Butte, Montana, this 6th day of May, A. D. 1938.

[Seal] C. R. GARLOW,  
Clerk.

[Endorsed]: Received May 9, 1938. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the  
Ninth Circuit

Excerpt from Proceedings of Monday, May 9,  
1938.

Before: Wilbur, Mathews and Healy,  
Circuit Judges.

[Title of Cause.]

ORDER GRANTING MOTION FOR ADMIS-  
SION TO BAIL PENDING APPEAL

Upon consideration of the motion of appellant for admission to bail pending appeal, and of objections of the appellee thereto, and of oral presentation thereon by Mr. H. Lowndes Maury, counsel for appellant, in support of said motion, and by Mr. R. Lewis Brown, Assistant United States Attorney, counsel for appellee, in opposition thereto; and good cause therefor appearing,

It Is Ordered that said motion be, and hereby is granted, and that appellant be, and he hereby is

admitted to bail pending determination of the appeal here in amount of Seven Thousand Five Hundred dollars (\$7,500.00); the bond to be conditioned as usual in such cases, and the surety or sureties to said bond to justify before the District Court of the United States for the District of Montana, Honorable James H. Baldwin, presiding, and the bond to be approved by said District Judge before appellant is released.

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United States Circuit Court of Appeals for the  
Ninth Circuit

Excerpt from Proceedings of Thursday, September 22, 1938.

Before: Wilbur, Haney and Healy,  
Circuit Judges.

[Title of Cause.]

#### ORDER OF SUBMISSION

Ordered appeal in above cause argued by Mr. H. Lowndes Maury, counsel for appellant, and by Mr. Earl C. Crouter, Sp. Asst. Attorney General, counsel for appellee, and submitted to the court for consideration and decision.

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United States Circuit Court of Appeals for the  
Ninth Circuit

Excerpt from Proceedings of Tuesday, December  
13, 1938.

Before: Wilbur, Mathews and Healy,  
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION  
AND DISSENTING OPINION AND FILING  
AND RECORDING OF DECREE

By direction of the Court, Ordered that the type-written opinion and dissenting opinion this day rendered by this court in this cause be forthwith filed by the clerk, and that a decree be filed in said cause and recorded in the minutes of this court in accordance with the majority opinion rendered therein.

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[Title of Circuit Court of Appeals and Cause.]

OPINION

Appeal from the District Court of the United States  
for the District of Montana.

Before: Wilbur, Haney and Healy,  
Circuit Judges.

Wilbur, Circuit Judge:

This is an appeal from an order of the District Court finding appellant in contempt of court. The proceedings out of which the contempt order grew

were brought under authority of act of Congress, 26 U.S.C.A. § 1523(a), as follows:

“\* \* to enforce summons. If any person is summoned under the internal-revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.”

The proceedings were initiated by a Special Agent of the Bureau of Internal Revenue who, in an affidavit filed in the District Court, alleged that in the course of his official duties he issued a subpoena, as he was authorized to do, and served it upon appellant to appear and testify as to certain knowledge believed to be had by appellant as to a tax return under investigation. He alleged that appellant appeared before him at the time and place designated in the subpoena but refused to give him any information or answer any questions concerning the subject of the inquiry. After hearing before the District Court, the Court on April 23, 1938 found that the statements set out in the affidavit were true and ordered appellant to appear before the Special Agent and give his testimony to all material matters and facts within his knowledge concerning the subject matter of the inquiry and investigation. After this order, the Special Agent filed another affidavit in which he stated that appellant had appeared be-

fore him and had refused to testify and prayed that the Court issue an order adjudging petitioner in contempt. After notice and hearing on this affidavit the Court, on April 28, 1938, entered an order finding appellant in contempt of court and ordered him "committed to the custody of the United States marshal for the District of Montana to be by said United States marshal confined in the county jail of Silver Bow County, Montana, and to be held in such confinement in such county jail by said United States marshal until the said William McCrone purges himself of his said contempt by obeying the order of this court, duly given and made on the 23rd day of April, 1938, by giving his testimony before Paul W. DeFoe, an agent and officer of the Internal Revenue Bureau, of all matters and facts within his personal knowledge concerning the subject matter of the inquiry and investigation now being carried on by the said Paul W. DeFoe, as such officer and agent, and by making a full, true, complete, accurate and truthful disclosure of all matters and facts within his knowledge, material and pertinent and concerning the subject matter of the investigation now being carried on by such officer."

Appellant took an appeal from this order in the manner and form provided for appeals from a criminal judgment by giving notice of appeal (May 2, 1938) accompanied by a statement of the grounds of appeal. On May 2, 1938, he served and lodged with the clerk a proposed bill of exceptions which was settled and allowed by the District Court on May 6,

1938. Assignment of errors was also served and filed. (See Rules of Practice and Procedure after plea of guilty, verdict or finding of guilt in criminal cases, etc., note § 723 (a), T. 28 U.S.C.A.)

At the outset, we must inquire as to our jurisdiction of the appeal. *Mitchell v. Maurer*, 293 U.S. 237, 55 S. Ct. 162, 79 L.Ed. 338; *Highway Construction Co. v. McClelland*, 14 F. 2d. 406; *Nixon v. Michaels*, 38 F. 2d. 420; *Cory Bros. & Co. v. U.S.*, 47 F. 2d. 607; *U.S. v. King & Howe*, 78 F. 2d. 693; *Osborn v. U.S.*, 50 F. 2d. 712; *In re Perlman*, 68 F. 2d. 729.

If the order attempted to be appealed from is civil in its nature, the act of February 13, 1925, ch. 229, 43 Stat. 936, 940, 28 U.S.C.A. § 230, requires a petition for, and allowance of, an appeal. *Alaska Packers Assn. v. Pillsbury*, 301 U.S. 174. If criminal in its nature, appeal under the Criminal Appeals Rules, *supra*, was proper and necessary. *Wilson v. Byron Jackson Co.*, 93 F. 2d. 577. It has been held that for the purposes of review the form of the order determines the character of the proceeding. If the order is for punishment of the defendant by a fixed period of imprisonment, one not determined by the defendant's compliance with the order of the Court, or is for a fine payable to the United States, the proceeding is regarded as criminal. If, however, the imprisonment ordered is for the purpose of compelling obedience to the order of the Court and is made on application and for the benefit of a com-

plain party, the proceeding is regarded as civil. *Fox v. Capital Co.*, 299 U.S. 105; *Matter of Christensen Engineering Co.*, 194 U.S. 458; *In re Merchants' Stock Co. et al.*, 223 U.S. 639; *Gompers v. Buck's Stove Co.*, 221 U.S. 418; *Wilson v. Byron Jackson Co.*, 93 F. 2d. 577, *supra*.

In the case at bar, it is clear that the proceedings as well as the form of the order were civil in their nature. As we have stated, the proceedings were initiated by an agent of the Bureau of Internal Revenue on behalf of that department of the Federal Government. The order, requiring appellant to testify, was made on the application of the Special Agent and the punishment was ordered to secure the relief asked for by the Special Agent and was to continue only so long as appellant refused to comply with the order of the Court.

The proceedings and order being civil in their nature, the next question is whether or not appellant has complied with 28 U.S.C.A. § 230, *supra*, providing that "no writ of error or appeal intended to bring any judgment or decree before a Circuit Court of Appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree." In *Alaska Packers Assn. v. Pillsbury*, 301 U.S. 174, *supra*, it was held that the giving of a notice of appeal required by our admiralty rule was insufficient to give jurisdiction of the appeal. The Court stated: "The reasons for requiring that an appeal be duly



applied for and allowed are that there may be some assurance that the suit is one in which there may be a review in the circuit court of appeals; that the decree is of such finality or character that it may be reexamined on appeal; and that appropriate security for costs may be taken where the appellant is not by law exempted from giving such security. In this way improvident and unauthorized appeals are prevented. While an appeal in a proper case is matter of right the question whether the case is a proper one under the law regulating appeals is not left to the appellant, but is to be examined and primarily determined by the court or judge to whom the application is to be made."

This court has been liberal in regard to what constitutes or is equivalent to a petition for and an allowance of an appeal by the court or judge. In *Crescent Wharf & Warehouse Co. v. Pillsbury*, 93 F. 2d. 761, we held that where not only a notice of appeal was served and filed but a bond for costs of appeal was presented to the judge and his approval thereof obtained, this constituted in effect an allowance of the appeal by the judge. In the *Diamond Cement case* (*Partos v. Pacific Coast S.S.Co.*, 95 F. 2d. 738) we held that where a written stipulation between parties providing what the apostles on appeal should contain was filed with the clerk of the district court and on the same day the district court entered an order transmitting and certifying certain exhibits to the Circuit Court of Appeals and, where subsequently a stipulation was filed providing that

supplemental apostles might be filed, including a transcript of an oral decision of the district court which upon submission to the district court was corrected and initialed by it, such action constituted a sufficient application for and allowance of an appeal by the district court.

These decisions are inapplicable to the case at bar. Here, the only actions of the trial judge or court subsequent to the judgment in question herein was the settling of the bill of exceptions and the denial of bail. There was nothing equivalent to the application for and allowance of an appeal. See *Share v. U.S.*, 50 F.2d. 669; *Von Holt v. Carter*, 56 F.2d. 61; *U.S. v. New National Coal and Mining Co.*, 72 F.2d. 168; *Ross v. White*, 32 F.2d. 750. Indeed, appellant does not contend that there was anything equivalent to an application for and allowance of an appeal pursuant to 28 U.S.C.A. § 230, *supra*. His contention is that the proceedings and order were for punishment of criminal contempt.

The appeal is dismissed.

Haney, Circuit Judge, dissenting.

I dissent.

In the instant case, the majority opinion holds that the appeal should be dismissed because appellant did not comply with 28 USCA § 230, which provides that no "appeal intended to bring any judgment or decree before a Circuit Court of Appeals for review shall be allowed unless application there-

for be duly made within three months after the entry of such judgment or decree". That statute is treated as being in existence and as the controlling rule.

Prior to our hearing of the cause, there became effective the Federal Rules of Civil Procedure, which provide in rule 73(a) that "a party may appeal from a judgment by filing with the district court a notice of appeal". It thus appears that the two rules regarding the procedure for taking an appeal are inconsistent. The question as to whether or not appellant used the proper procedure is now presented. If both rules are effective, we have a choice as to which rule we will apply.

It might be argued that the old rule providing for allowance of the appeal is no longer in existence because of the statute under which the Federal Rules of Civil Procedure were enacted, which provides that such rules "shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect". Thus, since the old rule is in conflict with rule 73(a), it might be argued that the old rule, as expressed in 28 USCA § 230 was repealed as of the effective date of the Federal Rules of Civil Procedure. However, for the purposes of the present discussion, I assume that the force of the new rules is greater than that of the statute under which they were promulgated, and use as a premise that both 25 USCA § 230, and the Federal Rules of Civil Procedure are in existence as seems to be the intent

of Rule 86. See also: Proceedings of The American Bar Association Institute, p. 188.

The rule last mentioned provides that the Federal Rules of Civil Procedure "govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice; in which event the former procedure applies".

I think it is clear that the instant cause was pending on September 16, 1938. See: Proceedings of The American Bar Association Institute, pp. 342, 380, 383. Likewise it is clear, that the hearing and determination are further proceedings, and therefore, the rules under rule 86 govern, unless (1) that rule is applicable only to the district courts, or (2) the application of the Federal Rules of Civil Procedure "would not be feasible or would work injustice".

Regarding rule 86, Chairman Mitchell of the Advisory Committee, in answering a question, said:

"I think it is clear that that case was tried in the district court under the old rule, and when the circuit court of appeals is reviewing the action of the trial judge under the old rules, it will test his decision by those rules. And the rule that provides for exercising discretion as to whether the old or new rules shall be applied to pending cases, has nothing to do with the



circuit court of appeals. It relates to the powers of the district court."

Proceedings of The American Bar Association Institute, p. 188. However at the same Institute Chairman Mitchell previously said that "officially nobody but the justices of the Supreme Court know what these rules mean" and "Furthermore, I think it was Lord Bacon who said that a person who drafted a document was least qualified to interpret it, because he always had in mind what he intended to say rather than what he actually said".

Was rule 86 intended to apply only to the district courts? The particular word used in the entire sentence is "court". The rules, however, specifically mention "district court", "appellate court", "circuit Court of appeals", "Supreme Court of the United States" and "court". While it is true that "appellate court" is used in most instances, and while in most cases where "court" is used it can be seen in those instances that the district court is meant, in rules 75 (k) and (l) the word "court" is used, and the appellate court is meant. I, therefore, believe that it should not be said that because of the habit of referring to the district court as the "court" whenever the word "court" is used, only the district court is meant.

The only other reason for so holding is that all the rules are applicable to the district court only. The Federal Rules of Civil Procedure prescribe a



course of action to be taken by: (1) the parties;<sup>1</sup> (2) the district court;<sup>2</sup> and (3) the appellate court.<sup>3</sup> Therefore, the rules are applicable not only to the district courts, but also to the appellate courts.

There is no suggestion here that application of the rules "would not be feasible or would work injustice". In fact there is no sound reason for depriving the appellant of a decision on the merits here. Appellee has not been misled by appellant's method of appeal, or changed its position. It is simply attempting to take advantage of a highly technical objection patently lacking substance. The rules were promulgated to simplify procedure, and to abolish many technicalities which could be used to defeat a decision on the merits. The majority opinion seems to me to lose sight of the purpose of the rules and in effect accomplishes the very thing the rules seek to abolish. I think that in determining

<sup>1</sup>E.g. Rule 8(a) described what a party shall plead in a claim for relief.

<sup>2</sup>E.g. Rule 42(b) prescribes action to be taken by the district court, i.e. the making of an order. The provision is directed to the district court, and prescribes no action to be taken by the parties, although their future course of action may be controlled thereby.

<sup>3</sup>There are several rules which have no application to the district court and require no action by it. They do require action, however, by the appellate court. E.g. Rule 46 requires review even though no exceptions are made by the parties. Another example is Rule 52(a) which provides that "Requests for findings are not necessary for purposes of review".

whether or not we have jurisdiction, the action taken by appellant should be tested by the rule now in existence, as specified in Rule 73(a) of the Federal Rules of Civil Procedure.

While application herein of the principle laid down in *Tighe v. Maryland Casualty Company* (CCA 9), November 7, 1938, might lead to a different result, that case considered a different rule than the one involved here, and should be limited to its facts. So limited, it is not here controlling.

[Endorsed]: Opinion and Dissenting Opinion.  
Filed Dec. 13, 1938. Paul P. O'Brien, Clerk.

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United States Circuit Court of Appeals for the  
Ninth Circuit

No., 8836

WILLIAM McCRONE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DECREE

Appeal from the District Court of the United States for the District of Montana.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Montana, and was duly submitted.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the appeal in this cause be, and hereby is, dismissed.

[Endorsed]: Filed and entered December 13, 1938.  
Paul P. O'Brien, Clerk.

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United States Circuit Court of Appeals for the  
Ninth Circuit

Excerpt from Proceedings of Monday, January  
16, 1939.

Before: Wilbur, Garrecht and Mathews,  
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR  
REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed January 11, 1939, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

**ORDER STAYING ISSUANCE OF MANDATE**

Upon application of Messrs. H. L. Maury and A. G. Shone, counsel for the appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including February 16, 1939; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

**CURTIS D. WILBUR,**

United States Circuit Judge.

Dated: San Francisco, California, January 16, 1939.

[Endorsed]: Filed Jan. 16, 1939. Paul P. O'Brien, Clerk.

CERTIFICATE OF CLERK, U. S. CIRCUIT  
COURT OF APPEALS FOR THE NINTH  
CIRCUIT, TO RECORD CERTIFIED UN-  
DER RULE 38 OF THE REVISED RULES  
OF THE SUPREME COURT OF THE  
UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred twenty-three (123) pages, numbered from and including 1 to and including 123, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of January, 1939.

[Seal]

PAUL P. O'BRIEN,

Clerk.

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SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 13, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



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